FILED

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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1994

Q-1 MOTOR EXPRESS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 27, 1994

QUESTION PRESENTED FOR REVIEW

Petitioner, Q-1 Motor Express, Inc., respectfully requests that a writ of certiorari issue to review the following questions previously presented to the National Labor Relations Board and United States Court of Appeals for the Seventh Circuit:

(a) Has the United States Court of Appeals for the Seventh Circuit sanctioned a departure by the National Labor Relations Board from the accepted and usual course of administrative adjudication by granting enforcement of an Order from the National Labor Relations Board that is based upon credibility determinations of an administrative law judge who was biased or gave the appearance of partiality?

(b) Does the decision of the United States Court of Appeals for the Seventh Circuit to enforce the bargaining order of the National Labor Relations Board conflict with decisions of this Court because the National Labor Relations Board has not shown either that Teamsters Local Union No. 89 represented a majority of Petitioner's drivers or that Petitioner's alleged violations of law would interfere with the holding of a fair election?

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[1] Donald Ray Denham, Dan W. Stevens and Anthony Lupo were individuals originally named as parties, and General Drivers, Warehousemen and Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL-CIO, was an entity originally named as a party to this case when it was before the National Labor Relations Board (the "Board"). The Board was substituted as the proper party hereto on March 26, 1993, when it filed its Application for Enforcement of Order with the United States Court of Appeals for the Seventh Circuit.

Q-1 Motor Express, Inc. is an independent corporation that has no subsidiaries that are not wholly owned.

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PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

This Petition seeks a writ of certiorari with respect to a published final Order of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") issued on May 25, 1994 and reprinted as Appendix A. *Appendix* at 1a. The Order granted the application of Respondent, National Labor Relations Board ("Board"), for enforcement of its order issued against Petitioner, Q-1 Motor Express, Inc. ("Q-1"), on September 30, 1992, reported at 308 NLRB No. 185 and reprinted as Appendix C. *Appendix* at 21a.

II.

JURISDICTION

The Seventh Circuit denied Q-1's petition for rehearing on July 29, 1994. Pursuant to Sup. Ct. Rule 13.4, the time for filing a petition for writ of certiorari runs from the date of the denial of a petition for rehearing. Accordingly, this Petition was timely filed within 90 days of the Seventh Circuit's Order denying Q-1's petition for rehearing. The jurisdiction of this Honorable Court to review the Board's Order on Petition for Writ of Certiorari rests upon 28 U.S.C. § 1254 (1992), as the Petition seeks the review of a judgment from a United States Court of Appeals.

III.

STATUTES INVOLVED

The primary statutory provisions relevant to this case are 29 U.S.C. §§ 157 and 160(a), which are reprinted verbatim as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other

> means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. § 160(a). Other relevant statutory provisions are 29 U.S.C. §§ 158(a)(1), (3) and (5) and 29 U.S.C. § 160(j).

IV.

STATEMENT OF THE CASE

A.

Summary Of The Facts

Q-1 is an Indiana corporation which, at the time the incidents which gave rise to this suit arose, had its principal office and terminal located in Clarksville, Indiana. Q-1 is a motor carrier engaged in the business of providing regulated, for-hire transportation services in interstate commerce.

In May, 1991, Teamsters Local Union No. 89 ("Local 89") began an organizational drive at Q-1's Clarksville facility. On May 17, 1991, Q-1's President, James E. Schroering, Jr. ("Schroering"), spoke with Q-1 driver Donald Denham ("Denham"). Denham claims that Schroering approached him at a fuel island and told him that he understood Denham was handing out union authorization cards, that he was not going to have any union representative telling

him how to run his business, that he had talked to his attorney and that he could shut down the business and re-open it in 72 hours with new employees.[2]

On May 19, 1991, Schroering held one of Q-1's periodic drivers meetings. At this meeting and in accordance with an announcement made several weeks earlier, Schroering told Q-1's drivers that, as a result of improved fuel economy, the drivers who had been with Q-1 for at least one year would receive a 1¢ per mile pay increase. Schroering was then asked whether it was possible to change the employment status of Q-1 driver Lupo from a casual to full-time driver. Schroering stated that he could not simply agree to the change, but would look into it.

On May 24, 1991, Q-1 driver Dan Stevens ("Stevens") claims that Schroering told him that he thought he "had better friends" amongst Q-1's drivers, that he knew everyone who had signed a union card, and that he would fire everybody who signed a card if necessary to keep the union out.[3]

Q-1 claims that, on May 28, 1991, it discharged Denham in accordance with its progressive discipline procedure. Prior to his discharge, Q-1 claims that Denham received an oral warning for truck log violations, a second oral warning for drifting off the road, a written warning for truck log violations, a second written warning for a "chargeable accident", and a three-day suspension for truck log violations. Denham was discharged for failing to record a ticket he received for a moving violation in his driver's log and for failing

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[2] Denham's testimony regarding this incident was credited by administrative law judge Walter Maloney ("ALJ Maloney"), who initially heard this case on behalf of the Board. Q-1 driver Anthony Lupo ("Lupo") allegedly overheard some of the statements Denham now attributes to Schroering. His testimony was also credited by ALJ Maloney. Schroering denied making any of the referenced statements to Denham.

[3] Stevens' testimony in this regard was also credited by ALJ Maloney. Schroering denied making any of these statements to Stevens.

to call in or report for work for nineteen hours during May 24 - 25, 1991.[4]

Q-1 claims that, on May 30, 1991, it discharged Stevens in accordance with its progressive discipline procedure. Prior to his discharge, Q-1 claims that Stevens received a written warning for his involvement in a preventable accident and his dishonesty in reporting the accident to Q-1, a second written warning for damaging Q-1's equipment, and a three day suspension for falsifying his worker's compensation claim report. Stevens was discharged for failing to report for work or make himself available for dispatch on May 28, 1991.[5]

Q-1 claims that, on June 21, 1991, it discharged casual employee Lupo. Prior to his discharge, Q-1 claims that Lupo had been denied a load on two separate occasions after calling in and admitting to having been involved in all-night drinking binges and that he had received a warning letter from Q-1 for failing to turn in paperwork and for refusing to make himself available for dispatch. Lupo was discharged for failing to report for work between June 17-20, 1991.[6]

By letter dated July 18, 1991, Local 89 demanded recognition as the exclusive bargaining representative of Q-1's Clarksville drivers. As of that date, there were 15 employees at Q-1's Clarksville facility. However, only seven authorization cards were submitted by Local 89 in support of its recognition demand. An eighth alleged card, that of Q-1 driver Homer Longoria, was claimed to exist, but was never introduced into evidence or otherwise accounted for by Local 89. Of the seven union authorization cards submitted for consideration, three were from

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[4] ALJ Maloney discredited this asserted reason for Denham's discharge.

[5] ALJ Maloney discredited this asserted reason for Stevens' discharge.

[6] ALJ Maloney discredited this asserted reason for Lupo's discharge.

Denham, Stevens[7] and Lupo, individuals previously discharged by Q-1. A fourth card was from Mark Suddeth, who did not work for Q-1 as a truck driver.[8]

On June 12, 1991, Denham, Stevens and Lupo and on July 18, 1991, Local 89 filed unfair labor practices charges with the Board (the "Charges"), alleging that Q-1 violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. §§ 158(a)(1), (3) and (5), by discriminating against Denham, Stevens and Lupo in order to discourage their membership in Local 89, and/or by discharging, threatening and coercing these drivers in an attempt to discourage such membership. A bargaining order and injunctive relief were sought as relief.

B.

The Administrative And Lower Court Proceedings

On August 14, 1991, an Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (the "Amended Complaint") was issued by the Board based on the Charges. On August 23, 1991, Q-1 filed its Answer to the Amended Complaint, denying all material allegations contained therein.

Approximately 90 days before the scheduled hearing date before ALJ Maloney on the Charges, the Board brought an action in the United States District Court for the Southern District of Indiana seeking injunctive relief against Q-1 pending the final disposition of

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[7] Stevens' card was also unsigned.

[8] In the Amended Complaint, the General Counsel alleged that the unit appropriate for purposes of collective bargaining was "All employees of [Q-1] employed as truck drivers at or out of [Q-1's] Clarksville, Indiana terminal, but excluding all guards and supervisors as defined in the Act." (Emphasis added.) Q-1, in its Answer to the Amended Complaint, admitted that this bargaining unit description was correct. The bargaining unit was later stipulated at the hearing to include drivers and mechanics.

the Charges, pursuant to Section 10(j) of the Act, 29 U.S.C. § 160(j). A three-day hearing was held thereafter on the Board's injunction petition, where all of the principal witnesses who would later appear before ALJ Maloney testified. United States District Court Judge Sarah Barker ("Judge Barker"), after the hearing on the Charges held by ALJ Maloney but before the issuance of ALJ Maloney's decision, then issued her decision denying the Board's petition. In so ruling, Judge Barker credited the testimony of Q-1's witnesses over that of the Board's witnesses, found that Q-1's witnesses were more credible than the Board's witnesses, and found that the testimony of the Board's witnesses was "scripted" and "less than candid." Judge Barker's decision is reprinted verbatim in the *Appendix* at 75a - 95a.

A hearing on the Amended Complaint was held on December 2 - 4, 1991 before ALJ Maloney. In his March 11, 1992 decision, ALJ Maloney found that Q-1 had violated Sections 8(a)(1), (3) and (5) of the Act by committing all of the acts alleged in the Amended Complaint, as well as other seven acts not alleged in the Amended Complaint. ALJ Maloney further found that Local 89 represented a majority of Q-1's employees in an appropriate bargaining unit, that Q-1's violations of the Act were so pervasive as to make a fair election unlikely and that a bargaining order was therefore appropriate. ALJ Maloney recommended that Q-1 cease and desist from the violations found, reinstate and make whole Denham, Stevens and Lupo, and bargain in good faith with Local 89 upon request.

By Decision and Order dated September 30, 1992, the Board dismissed the seven Section 8(a)(1) violations found by ALJ Maloney but not alleged in the Amended Complaint, as well as the Section 8(a)(5) violation found by ALJ Maloney, yet otherwise adopted ALJ Maloney's other rulings, findings and conclusions, including those regarding witness credibility.

On May 25, 1994, a panel of the Seventh Circuit,[9] Circuit Judges Lay and Rovenor with Judge Coffey dissenting, issued its decision in this case. The Seventh Circuit granted the Board's application for enforcement of its Order and denied Q-1's cross-application for review. The panel majority found that there was substantial evidence supporting the Board's Sections 8(a)(1) and 8(a)(3) determinations, that Q-1 presented no evidence that would lead it to disturb the Board's finding that Local 89 had majority status as of May 19, 1991, and that there was no abuse of discretion in the Board's determination that a bargaining order was appropriate to remedy Q-1's alleged violations of the Act. By Order dated July 29, 1994, the Seventh Circuit denied Q-1's petition for rehearing and suggestion for rehearing.

V.

REASONS FOR GRANTING THE WRIT

A.

The Seventh Circuit's Ruling Sanctions A Departure By The Board From The Accepted And Usual Course Of Administrative Adjudication

Enforcement of the Board's Order would sanction a departure from the accepted and usual course of administrative adjudication. "Justice must satisfy the appearance of justice" and "administrative agencies, as well as administrative law judges, must avoid even the appearance of bias or impartiality." *In Re Murchison*, 349 U.S. 133, 136 (1955). In this case there are irreconcilable differences between the credibility findings of Judge Barker and ALJ Maloney. ALJ Maloney reached the exact opposite conclusion regarding the credibility of the parties' witnesses as did Judge Barker after hearing virtually the same testimony from the same principal witnesses. Judge Barker found that Q-1's witnesses were more credible than

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[9] The Seventh Circuit had appellate jurisdiction in this case by virtue of 29 U.S.C. §§ 160(e) and (f).

the Board's witnesses and that the testimony of the Board's witnesses appeared to have "scripted" and was less than candid. ALJ Maloney, on the other hand and without giving any explanation as to why his credibility findings were directly opposed to those of Judge Barker, credited the testimony of the Board's witnesses over that of Q-1's witnesses. This unexplained inconsistency is especially troublesome in light of the fact that the hearing before Judge Barker occurred prior to the hearing before ALJ Maloney, when witnesses' memories and recollection of events were presumably clearer and more vivid.

Additionally, several findings made by ALJ Maloney strongly suggest that he was, in fact, biased against Q-1. For example, ALJ Maloney based his decision against Q-1 on seven violations of Section 8(a)(1) of the Act that the Board did not even allege in its Amended Complaint, and a violation of Section 8(a)(5) of the Act that the Board on review found could not have occurred. These facts alone strongly infer that ALJ Maloney was less than objective about this case. The fact that the Board was forced to affirmatively disavow and dismiss ALJ Maloney's findings, including findings that a conversation between Q-1 supervisors, with no employees present, and Q-1's consultation with its attorney prior to discharging Denham, somehow violated the Act, only provide additional and independent evidence of his bias against Q-1. In appearance, if not fact, these circumstances suggest that ALJ Maloney sought to manufacture additional charges against Q-1 by construing case evidence in a manner that was unfair to Q-1 and an inappropriate exercise of his administrative powers and duties.

The Board then compounded ALJ Maloney's inappropriate behavior by simply accepting his credibility findings without explaining or even acknowledging the known and contrary credibility findings of Judge Barker and without offering any rationale as to how it was able to "disavow" certain of ALJ Maloney's findings yet fully credit others subject to the same taint of bias.

In enforcing the Board's Order, the Seventh Circuit declined what it characterized as "Q-1's attempt to engage this Court in

renewed fact finding." Such a response simply allows the charade to continue, offers no guidance as to when and under what circumstances the biased findings of an administrative law judge can be challenged, and sanctions ALJ Maloney's obvious departure from the usual and accepted course of administrative adjudication. Given the Board's unwillingness or inability to establish uniform standards for the review of administrative decisions for bias and partiality, this Honorable Court must set such standards on the Board's behalf, or Q-1 and others similarly situated will be left with no viable means for reviewing and obtaining relief from such administrative malfeasance.

B.

The Seventh Circuit's Ruling
Conflicts With *Gissel Packing Co.*

Q-1 calls upon this Court to revisit its 1969 decision in *National Labor Relations Board v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). In *Gissel*, the Court observed that bargaining orders are appropriate remedies for unfair labor practices only in those rare and extraordinary cases where a union's majority status has been established and employer practices are found to be so extensive in terms of their past effect on election conditions and in their likelihood of reoccurrence that the possibility of ensuring a fair election by the use of traditional remedies is slight.

In this case, the Board's Order violates *Gissel,* as the majority status of Local 89 has never been established. In this regard, unambiguous union authorization cards, stating on their face that their signer authorizes the union to represent the employee for collective bargaining purposes, were never obtained from a majority of Q-1's employees. Only seven cards were proffered by the Board for Q-1's 15-driver unit. Even if the cards of Denham, Lupo, and Stevens are not subtracted from this total as being cards from individuals who were not Q-1 employees at the time in question, this does not change the fact that a finding of majority status, a pre-requisite under *Gissel* for the issuance of a bargaining order, has not

been established. The "eighth card" relied upon by the Board to meet its majority requirement was never seen by anyone at any time save the driver who claimed to have signed it.[10] This is not the case of a "misplaced card," as the Board contends. It is the case of a card whose existence enjoys no corroborating testimony. Never before has such a "phantom card" been allowed by the Board or the courts to decide the question of majority status. The ramifications of allowing such uncorroborated testimony to establish a card majority are obvious and do not meet the requirements nor the spirit of *Gissel*.

The Board's Order also violates *Gissel* in that no showing has been made that less extraordinary remedies will not prove sufficient to protect the Section 7 rights of Q-1's employees. Eight of the nine alleged Section 8(a)(1) violations not disavowed by the Board involve the same three drivers only and took place during a total of four exchanges during three days within a seven-day period in an approximately 75-day organizing campaign. All but two of these exchanges were private conversations, and at least seven had no chilling effect on their recipient, as Denham, Stevens and Lupo apparently continued their organizational efforts unabated. Additionally, only one employee from Q-1's original bargaining unit is still working at Q-1, and Q-1 no longer operates its Clarksville facility.

The above facts do not establish that a fair election could not be held at Q-1 or that employee sentiment would be better protected by a bargaining order than by the Board's more traditional remedies. Among other things, one cannot reasonably determine from the Board's Order (1) whether the Board gave due consideration to Q-1's employees' section 7 rights, one of the fundamental purposes of the Act, (2) why the Board concluded that other purposes must override the rights of Q-1's employees to choose their own bargaining representative, (3) why other remedies, less destructive

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[10] Reliance on this phantom "eighth card" to establish majority status is even more tenuous given the testimony of Longoria that he signed a card and gave it to fellow driver Howard Starcher to hold until he saw what was going to happen. Tr. 333.

to employees' rights, are not adequate, and (4) how the Board was able to disavow some of ALJ Maloney's findings yet determine, without comment, that such disavowals would necessarily have no effect on his decision to recommend the issuance of a bargaining order.[11]

Nothing is said in the Board's Order about any potential continuing effect of Q-1's alleged misconduct or whether Q-1's alleged misconduct or has undermined union support or whether Q-1's favorable labor relations history and its current management attitude decreases the likelihood of future misconduct. Nothing is said about the potential effectiveness of the Board's traditional remedies, such as a cease and desist order, or the posting of notices or the reinstatement of affected employees. Instead, the Board simply "laundry lists" the Section 8(a)(1) and (a)(3) findings of ALJ Maloney that it did not "disavow," and then concludes that the possibility of erasing the effects of such violations is "slight" and the holding of a fair election "unlikely." The Board's Order thus violates *Gissel* by failing to explain how or why it believes that Q-1's actions, over three years ago, would now interfere with the holding of a fair election or could not be remedied by less extraordinary means.

The Seventh Circuit glosses over this Board failure by positing its own views as to why Q-1's actions might weigh against the effectiveness of less drastic remedies. However, such dictum by the Seventh Circuit cannot remedy the Board's own failure to comply with its *Gissel* obligations. Since 1969, the Board has issued numerous conflicting decisions as to when a bargaining order should issue and when less draconian remedies are sufficient.[12] This

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[11] ALJ Maloney based his remedy, at least in part, on seven Section 8(a)(1) violations that were not alleged in the Amended Complaint and were later dismissed by the Board. There was no explanation of whether the remaining violations would nonetheless serve as a basis for a *Gissel* bargaining order.

[12] For example, in *Teksid Aluminum Foundry*, 311 No. 71 (1991), the Board found that an employer had violated Section 8(a)(1) of the Act by, among other things, involving itself in three instances of actual surveillance, five instances of prohibiting protected employee activities and numerous instances of coercive

Honorable Court should now set uniform standards that will protect the interests of Q-1's employees, and of other employees similarly situated, in being permitted to choose their own collective bargaining representatives before a *Gissel* bargaining order is issued by the Board.

VI.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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interrogation, threats of reprisal and discharge, plus several more instances of soliciting and promising to adjust grievances. In addition, the employer was found to have violated Section 8(a)(3) by, among other things, imposing six disciplinary warnings, four disciplinary suspensions and four disciplinary discharges. These violations of the Act were more numerous, more widespread, more prolonged and more egregious than any alleged to have been committed by Q-1. Yet the Board in *Teksid* acknowledged and approved the use of traditional remedies to rectify the employer's misconduct.

Supreme Court, U.S.
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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 93-1746
NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

Q-1 MOTOR EXPRESS, INCORPORATED,

Respondent.

Application for Enforcement of an Order of
the National Labor Relations Board
Nos. 9-CA-28654-1, 9-CA-28654-2, 9-CA-28654-3
and 9-CA-28762

ARGUED NOVEMBER 30, 1993—DECIDED MAY 25, 1994

Before LAY,* COFFEY and ROVNER, *Circuit Judges.*

LAY, *Circuit Judge.* The National Labor Relations Board (the "Board") seeks enforcement of its order finding Q-1 Motor Express, Inc. ("Q-1" or the "Company"), guilty of unfair labor

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* The Honorable Donald P. Lay, Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

practices.[1] The Board held, in accordance with the findings of an Administrative Law Judge ("ALJ"), that the Company had violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1988) ("the Act"), by threatening employees with closure of its terminal, job losses, and other reprisals if they became unionized; by creating the impression of surveillance of union activities; and by granting the employees pay increases and promising to address their grievances in order to discourage union activities. The Board also affirmed the ALJ's findings that Q-1 had violated sections 8(a)(1) and 8(a)(3) of the Act, 29 U.S.C. §§ 158(a)(1), (3) (1988), by discharging three pro-union employees, drivers Donald Denham, Dan Stevens, and Anthony Lupo, because of their union activities. The Board found that the General Drivers, Warehousemen & Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL-CIO ("the Union"), represented a majority of the Company's employees in an appropriate bargaining unit as of May 19, 1991, an appropriate date for examining section 8(a)(1) and 8(a)(3) violations, and determined that the Company's violations were so pervasive as to make a fair election unlikely. The Board held that a bargaining order was therefore appropriate. It ordered the Company to reinstate Denham, Stevens, and Lupo and to bargain in good faith with the Union upon request. This enforcement action, and the Company's cross-petition for review, followed.

Upon careful review of the record, we find substantial evidence supporting the Board's section 8(a)(1) and 8(a)(3) determinations.[2] We further find no abuse of discretion in the Board's determination that a bargaining order is appropriate to

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[1] Q-1 Motor Express, Inc., an Indiana Corporation, had at all times relevant its principal office and terminal in Clarksville, Indiana. It is engaged in interstate trucking.

[2] Our review of a Board order is confined to assessing only whether the Board's "factual findings are supported by substantial evidence in the record as a whole and its legal conclusions have a reasonable basis in the law.'" *Livingston Pipe & Tube, Inc. v. NLRB*, 987 F.2d 422, 426 (7th Cir. 1993) (quoting *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1471 (7th Cir. 1992)).

remedy the violations at Q-1. We therefore enforce the Board's order.

I. BACKGROUND

In early May, 1991, Q-1 driver Donald Denham contacted the Union about organizing the Company's employees. Denham obtained union authorization cards and with the help of other employees began soliciting card signatures.

The Company became aware of the organizing campaign shortly after it began, and it responded with hostility. As found by the ALJ, about a week after part-time driver Anthony Lupo signed an authorization card, a Q-1 supervisor told him that Company management knew that union cards were being distributed and that if he knew what was good for him, he would stay away from those involved in the effort. Another driver who had signed an authorization card was told by this same supervisor, whose husband was a Q-1 driver, that she hoped her own husband would not join the Union. If he did, the supervisor explained, he would have to find another job, because "Q-1 could not stand union pressure."

A short time later, on May 17, Q-1 President James E. Schroering confronted organizer Denham at a truck stop, telling him, in a conversation that was overhead in part by driver Lupo, that he knew that Denham was the one passing out the union cards. Schroering told Denham that he had spoken with his attorney and had been advised that to thwart the Union, he could fire all the drivers, close the Company down, and then reopen with new drivers 72 hours later. Denham testified that Schroering said he would not permit "no half-ass Union [to] come in and try to tell him how to run his business." TR. at 86. Schroering also informed Denham that he had called Denham's previous employer and learned that Denham had been a member of the Teamsters Union for ten years. Finally, Schroering told Denham that he knew that the drivers were planning a meeting for May 19, and that he was going to hold a meeting with the drivers that same day.

On May 19, the day of the employees' organization meeting, Q-1 ran, for the first time, a newspaper advertisement for new drivers. At the meeting, the employees discussed the advertisement and wondered why the Company was seeking more drivers when it had for months refused to put part-time driver Lupo on full-time status. The drivers also discussed the Company's failure to raise their compensation rates, a major impetus for the organizing campaign. Denham informed the employees who had gathered that he had received authorization cards from a majority of the drivers and that he had told the Union that they had elected it as their bargaining representative.

Later that afternoon, the Company began its own meeting with the employees. Q-1 Vice President James J. Schroering began the meeting by complaining about unions and stating that he knew that "little green [union] cards" were being circulated among the employees. President James E. Schroering then announced that the Company was increasing the compensation rates for the drivers, purportedly because of the improved gas mileage the drivers had been able to attain. He also invited the employees to express their job concerns and agreed to give Lupo more hours in exchange for a reduction in the hours driven by the other drivers.

After the Company meeting, Denham and some of the other Union supporters met to discuss the status of the organizing campaign. Driver Dan Stevens, who had filled out his union card at the earlier meeting but forgotten to sign it, asked Denham to turn his card in along with the others. Denham and Lupo then arranged for Lupo to deliver the cards to the Union. The ALJ determined that as of May 19, 1991, eight authorization cards had been executed, enough to constitute a majority of the bargaining unit's eleven employees.

On Friday, May 24, President James E. Schroering complained to Stevens that he thought he "had better friends in this Company amongst the drivers than what's turned out to be." He told Stevens, "I know everybody that signed a Union card. [I]f it takes firing everybody to keep the Union out of here, then that's

what I will do." Tr. at 434. Shortly thereafter, three union supporters, including Denham, Stevens, and Lupo, were fired.

Q-1 asserts that each of the employees was fired in accordance with Q-1's disciplinary procedures, for work-related transgressions. The ALJ thoroughly examined and rejected each of the Company's proffered explanations and concluded that the three drivers had been discharged because of their union membership and activities.

On July 18, 1991, the Union wrote to the Company to demand recognition. The Company failed to reply. The Union also filed a charge with the Board accusing Q-1 of unlawfully attempting to discourage employee support for the Union and requesting that, in view of Q-1's unlawful conduct, the Board issue a bargaining order.[3]

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[3] On October 2, 1991, the General Counsel for the Board petitioned for temporary injunctive relief against Q-1 under section 10(j) of the Act, pending final disposition of the amended complaint. The 10(j) proceeding concerned the same alleged 8(a)(1), (3), and (5) violations included in this action. The General Counsel sought reinstatement of Denham, Stevens, and Lupo and a bargaining order requiring Q-1 to recognize and bargain with the Union as the employees' exclusive bargaining agent. On December 27, Judge Sarah Barker of the United States District Court for the Southern District of Indiana denied the General Counsel's requested relief. At the later hearing on merits, the Board denied the Company's request to reopen the record in this case to include the transcript of the 10(j) proceeding.

On appeal, Q-1 places emphasis upon Judge Barker's credibility findings (which seemingly contradict the ALJ's findings in this proceeding). We have not studied the 10(j) proceeding. The transcript is not part of the record before us. However, and more importantly, the law is clear that "findings made on a motion for temporary injunction under section 10(j) are not determinative of the merits in a subsequent unfair labor practice proceeding, and that review of the latter is limited by the substantial evidence rule." *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 957 (2d Cir. 1988); *accord NLRB v.Acker Indus., Inc.*, 460 F.2d 649, 652 (10th Cir. 1972). A district court conducting a 10(j) hearing is asked to assess the harm that may occur during the course of the ensuing administrative proceedings and "the *probability* that the General Counsel will succeed in convincing the NLRB that someone has in fact violated the labor laws." *Kinney v. Pioneer Press*, 881

(continued...)

II. DISCUSSION

A. *Unfair Labor Practices*

1. *Section 8(a)(1) Violations*

On the basis of the testimony credited by the ALJ, the record fully supports the Board's findings of unfair labor practices. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights" to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §§ 157, 158(a)(1) (1988); *see NLRB v. Overnit Transp. Co.*, 938 F.2d 815, 819 (7th Cir. 1991). The test for what constitutes "interference" with these rights is not whether an attempt at coercion succeeded or failed, but whether the employer engaged in conduct that "'reasonably tends to interfere with, restrain, or coerce employees in the free exercise'" of their protected rights. *Id.* at 819 n.5 (citation omitted); *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 689 (7th Cir. 1982).

The record before us is replete with instances of comments and conduct that would reasonably tend to interfere with the employees' right to self-organization. As we noted in *Central Transport v. NLRB*, 997 F.2d 1180 (7th Cir. 1993), "Threatening employees with shop closure or discharge, or coercively interrogating them to discourage union activities violates Section 8(a)(1) of

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[3](...continued)
F.2d 485, 491 (7th Cir. 1989) (emphasis added); *see also Kinney v. International Union of Operating Eng'rs, Local 150*, 994 F.2d 1271 (7th Cir. 1993). The court's goal is to "'minimize the costs of being mistaken,' all things considered." *Pioneer Press*, 881 F.2d at 490 n.3 (citation omitted). The court therefore must attempt to predict what the eventual outcome of the Board's proceedings will be and to act accordingly. If the eventual outcome turns out to be different from what was predicted, however, it is obviously the prediction, not the outcome, that must be rejected.

the Act," *id.* at 1189. Here, Q-1 management personnel repeatedly threatened drivers that Q-1 would shut down and reopen with new employees rather than allow the drivers to unionize. Moreover, Q-1 President James E. Schroering interrogated drivers (and in one case, a driver's spouse) about the union organization efforts and made explicit and implicit threats of retaliation. *See Berger,* 678 F.2d at 689 (observing that "when the questions asked 'viewed and interpreted as the employee must have understood the questioning and its ramifications, could reasonably coerce or intimidate the employee with regard to union activities,' a violation has been established" (citation omitted)). Through such coercive interrogations and numerous other statements, Q-1 created an impression that it was engaged in surveillance of the union activities, another impermissible labor practice under section 8(a)(1). *See id.* at 691.

Additionally, the record supports the Board's finding that Q-1 violated section 8(a)(1) by soliciting grievances and promising benefits at the May 19 meeting that could reasonably appear, when viewed from the drivers' perspective, to be aimed directly at interfering with the union organization efforts. *See id.* After months of pressure to increase the drivers' compensation, Q-1 finally announced an increase at the May 19 meeting, at the height of the union organizing campaign. Especially in the context of the Company's open hostility to unionization, such timing might reasonably appear to be part of the Company's continuing effort to interfere with the employees' organizational activities.

2. *Section 8(a)(3) Violations*

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate against an employee "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1988). An employer violates section 8(a)(3) if it discharges an employee because of her union activities. *Id.* In considering 8(a)(3) allegations, the Board may properly consider such circumstantial evidence as whether the

employer committed other unfair labor practices or otherwise expressed anti-union animus in the period shortly before the dismissals. *Livingston Pipe & Tube Inc. v. NLRB*, 987 F.2d 422, 426 (7th Cir. 1993). At that point, "'[o]nce the general counsel establishes that the employer was motivated by antiunion sentiment, the employer will be held in violation of the Act unless it can show that the same decisions would have been made absent the employee's protected activity.'" *Id.* (quoting *J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616, 620 (7th Cir. 1991)).

The record contains substantial evidence that the discharged employees' union activities were a motivating factor in their discharge. Denham, Stevens, and Lupo were all fired closely on the heels of the organizing campaign and within three weeks of one another. No employee of Q-1 had ever previously been discharged. The Company made it known to each of them that it was aware of their pro-union activities, including the fact that Denham had been the one distributing authorization cards, and it threatened each of them with retaliation. President James E. Schroering even specifically threatened Stevens that he would fire "everybody" if that is what it took to keep the Union out of Q-1. Given these circumstances, we believe that substantial evidence supports the Board's finding that the General Counsel met its burden of establishing by a preponderance of the evidence that anti-union animus was a motivating factor in the Company's actions against these employees. *See id.* at 427.

Similarly, substantial evidence supports the Board's finding that the Company failed in its attempt to show that it would have made the same decisions in the absence of the employees' union activities. *See id.* The Company claims that the discharges occurred pursuant to its disciplinary procedures and were based on employee misconduct. The Company asserts that Denham had committed numerous log violations and, in particular, failed to report his whereabouts for over nineteen hours after making an eight-hour trip from Milwaukee. The ALJ, however, credited the testimony of numerous witnesses that the log violations were condoned by the Company and Denham's testimony that he had

called the dispatcher at repeated intervals throughout his supposed nineteen-hour absence.

Stevens allegedly was discharged for not being available when he was supposed to be, after receiving prior discipline for damaging Q-1 equipment and falsifying a worker's compensation claim report. Stevens, like Denham, never received the alleged prior reprimands until the 10(j) hearing in October of 1991, and the record supports the ALJ's determination that the complaints were stale and "coupled with a fanciful version of events."

Finally, Q-1 asserts that it discharged Lupo for not being available for dispatch on May 22 because of drinking, and for failing to turn in paperwork from a particular trip to Milwaukee. The record shows, however, that the Company did not have a policy of forced dispatch, that Lupo had not been drinking the night before, and that he supplied the necessary bill of lading when he went in for his last paycheck (having not been dispatched between the time of the trip in question and that point).

On the basis of the strong evidence of the Company's anti-union motivations and the weakness of the Company's alternative explanations for its conduct, we find that substantial evidence supports the Board's conclusion that Denham, Stevens, and Lupo would not have been discharged absent their union activities.

3. *Bias*

The Company responds to the Board's conclusions primarily by disputing the facts upon which the Board based its determinations. It presents on appeal an alternative version of the events outlined above and contends that the ALJ and the Board erred in crediting the testimony of the employee witnesses rather than the witnesses provided by Q-1. Based upon its alternative account, it argues that no unfair labor practices occurred. We reject Q-1's attempt to engage this Court in renewed factfinding, and we affirm the Board's findings.

Q-1 acknowledges that we will not overturn an ALJ's credibility determinations absent extraordinary circumstances, such as a showing of bias, utter disregard for uncontroverted sworn testimony, or the acceptance of facially incredible testimony. *See Central Transp.*, 997 F.2d at 1190; *see also Pittsburgh S.S. Co. v. NLRB*, 337 U.S. 656, 659-60 (1949). It urges, however, that the ALJ in this case displayed "constant antagonism towards Q-1's witnesses and counsel," and that his findings reflect "both his bias against Q-1 and his desire to credit the testimony of the General Counsel's witnesses at any cost."

We see no evidence of any bias or prejudicial conduct by the ALJ that would taint the administrative proceedings. Contrary to Q-1's assertion, it is not necessarily bias for an ALJ to credit all of the witnesses on one side of a dispute and none of the witnesses on the other. *Imact Indus., Inc. v. NLRB*, 847 KF.2d 379, 382 (7th Cir. 1988); *Berger*, 678 F.2d at 687; *accord Conair Corp. v. NLRB*, 721 F.2d 1355, 1367 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984). As the Supreme Court observed in rejecting a similar argument years ago:

> [T]he facts disputed in litigation are not random unknowns in isolated equations—they are facets of related human behavior, and the chiseling of one facet helps to mark the borders of the next. Thus, in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next. Accordingly, total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact.

Pittsburgh S.S. Co., 337 U.S. at 659. In the case before us, the ALJ credited testimony by the employee witnesses that was mutually corroborative, given in some instances by witnesses who were no longer employed by Q-1 and thus had no motive to lie, and that, in the case of the alleged threats of reprisal, was borne out by events such as the firing of Denham, Stevens, and Lupo. On the other hand, the ALJ discredited the testimony of such Q-1 witnesses as

President James E. Schroering, whose credibility was cast into doubt by his denial, in the face of overwhelming evidence, that Q-1 drivers were forced to falsify their Department of Transportation logs in order to meet the Company's tight delivery schedule.

"Credibility . . . is a function not only of what a witness says but of how a witness says it, and the cold record before this court is a poor medium for conveying anything other than a witness's exact words." *Overnite Transp.*, 938 F.2d at 819. We see no "extraordinary circumstances" in the cold record before us that would lead us to conclude that the ALJ's decision to credit the employee witnesses warrants reversal.

B. *The Bargaining Order*

Based upon its finding that Q-1 had committed numerous section 8(a)(1) and 8(a)(3) violations, the Board issued a bargaining order that requires Q-1 to bargain in good faith with the Union. The Board has authority to issue such orders to combat unfair labor practices that "have the tendency to undermine majority strength and impede the election processes." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969); *see Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1081 (7th Cir. 1981). A bargaining order is justified if the Union "at one time" enjoyed majority status and "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight." *Gissel*, 395 U.S. at 614. "The determination of the appropriateness of a bargaining order is, like all remedies, entrusted to the sound discretion of the Board." *Justak,*, 664 F.2d at 1081. We will reverse the Board's order only if it constitutes an abuse of the Board's discretion. *See id.* at 1082.

1. *Majority Status*

Q-1 argues that the Union lacked majority support at the time the Union demanded recognition on July 18, 1991, and that therefore a bargaining order is impermissible. When a bargaining order is issued to remedy section 8(a)(1) and 8(a)(3) violations,

however, *Gissel* requires a showing only that "at one time" the union had majority status—not that the union had a majority when it demanded recognition. *Gissel,* 395 U.S. at 614; *First Lakewood Assocs. v. NLRB,* 582 F.2d 416, 422 (7th Cir. 1978).

The ALJ found that six of the eleven members of the bargaining unit, which consisted of all full-time and regular part-time truck drivers and driver-mechanics employed at the Clarksville terminal,[4] had signed union authorization cards as of May 19—before Denham, Stevens, and Lupo were fired and before Q-1 hired four new drivers. In addition, one card (Stevens') was filled out but not signed, and another (driver Homer Longoria's) was not produced at the hearing, although Longoria testified that he had signed one. The ALJ and the Board concluded that the "at one time" criterion for majority status had been satisfied.

Q-1 contends, though, that even as of May 19, there was no majority. It argues that Stevens' and Longoria's authorizations were invalid and that one of the signed cards, Martin Suddeth's, should not have been counted because Suddeth was a mechanic, not a truck driver, and thus he was not part of the bargaining unit. We reject each of these challenges.

Longoria's testimony at the administrative hearing that he had completed an authorization card prior to May 19 and had given it to another driver for delivery to the Union is probative of the Union's majority status, even though the card was later misplaced. *Cf. Hedstrom Co. v. NLRB,* 558 F.2d 1137, 1150 n.34 (3d Cir. 1977) (affirming Board's inclusion of misplaced card in tally of majority status); *NLRB v. International Metal Specialities, Inc.,* 433 F.2d 870, 872 (2d Cir. 1970) (same), *cert. denied,* 402 U.S. 907 (1971). Similarly, we find no error in the ALJ's inclusion of Stevens' unsigned card among the majority. Stevens had filled out the card, printed his full name on it, orally affirmed his intent—both at the May 19 meeting and later at the hearing—that it be submitted

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[4] The parties stipulated on the record to this characterization of the bargaining unit. Tr. at 210-11.

to the Union with the other authorization cards, and credibly explained why he forgot to sign.[5] Under such circumstances, it was reasonable for the ALJ and the Board to conclude that the card was authentic and that Stevens "'did, in effect, do what he would have done by voting in a Board election,'" *Medline Indus., Inc. v. NLRB*, 593 F.2d 788, 793 (7th Cir. 1979) (citation omitted). Finally, we see no error in the ALJ's inclusion of Suddeth's card. The parties stipulated that the relevant bargaining unit included driver-mechanics, and the record shows that Suddeth fit that description. Suddeth testified that in addition to his work as a mechanic, he made occasional freight deliveries, for which he was paid the same mileage rates as the other drivers. Q-1 has thus presented no evidence that would lead us to disturb the Board's finidng that the Union did, indeed, have majority status as of May 19, 1991.

2. *Appropriateness of the Bargaining Order*

Q-1 further argues that even if the Union did have majority status, the bargaining order was inappropriate for other reasons. In particular, it asserts that its alleged unfair labor practices centered around only three individuals, Denham, Stevens, and Lupo, who constituted only a small minority of the bargaining unit, and that the record does not otherwise support the Board's finding that a fair election would now be impossible. After careful consideration, we disagree.

A bargaining order is "strong medicine and is to be implemented with the utmost care." *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 439 (7th Cir. 1993). Consequently, we have found it an abuse of the Board's discretion to impose a bargaining order without sufficient analysis and discussion of the adequacy of traditional remedies. *See Montgomery Ward & Co. v. NLRB*, 904

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[5] Stevens testified: "I just forgot to [sign], and what happened was, I was filling it out on the hood of somebody's truck, and I was in a hurry because I was trying to listen to . . . the discussion amongst the drivers, and it was a complete oversight on my part, but I did mean to put my signature on it." Tr. at 413.

F.2d 1156, 1159 (7th Cir. 1990). In this case, we believe the Board discharged its burden. It considered the severity of the unfair labor practices; the high-level management officials who committed them; the timing of the threats of discharge and plant closure, as well as of the promises to increase pay and address grievances; the fact that, in its view, all of the employees were affected; and the small size of the bargaining unit. In light of these factors, the Board concluded that "the possibility of erasing the effects of the Respondent's extensive and serious violations is slight and the holding of a fair election unlikely."

The Board's discussion is not a mere "summary conclusion," such as that disapproved of in *Montgomery Ward. See* 904 F.2d at 1159. Instead, it is a delineation of factors, supported by the record, that we have repeatedly found sufficient to justify a bargaining order. *See Ron Tirapelli Ford,* 987 F.2d at 441 & n.10; *Berger,* 678 F.2d at 69; *Justak,* 664 F.2d at 1082. As we said in *Justak,*, in describing the impact of unfair labor practices that are remarkably similar to those before us (including the termination of exactly three pro-union employees):

> The probable impact of unfair labor practices is increased when a small bargaining unit is involved. The Company's violations are not minor. It engaged in surveillance of union activities, discharged pro-Union employees, threatened layoffs . . . and both promised and granted benefits to thwart unionization. Threats were not only made but executed. ("Actions speak louder than words," as the administrative law judge noted.) Under such circumstances, and after a careful review of the record, we fully agree with the Board that a bargaining order is an appropriate remedy.

664 F.2d at 1082 (citations omitted). The same can be said here.

Q-1 contends that the Board has not shown how Q-1's alleged violations would interfere with the holding of a fair election. The Board, however, is not required to explain with scientific

accuracy the impact of unfair labor practices. *Id.* at 1081. It need only list the factors that it considers in making its determination that a bargaining order is warranted and describe how these factors have been weighed against the efficacy of less drastic remedies. *See id.; see also Ron Tirapelli Ford,* 987 F.2d at 441 (describing Board's balancing of interests). At some point, "common sense recognizes the dramatic and long term effects of such threats" as were made here. *Justak,* 664 F.2d at 1082. Q-1's highest management demonstrated in unmistakable terms to all of the employees, not just the three who were actually discharged, that union activity would not be tolerated and that those who partcipated were being watched and would be punished, to the point of losing their livelihoods. Such a chilling lesson can be expected to persist and pervade the labor-management relations at Q-1, both in the memories of those who were there and in the lore of the shop after they leave.[6] In such circumstances, a bargaining order is not an abuse of the Board discretion.

III. CONCLUSION

This is not a difficult case. The findings of the ALJ, as adopted by the Board and affirmed here, demonstrate a persistent

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[6] Our conclusion is thus not altered by Q-1's assertion in its brief, made without reference to any evidence in the record, that all but one of the original employees of the bargaining unit has by this time left Q-1. While changes in circumstances over a long period of time are relevant to determining the propriety of a bargaining order, *see Montgomery Ward,* 904 F.2d at 1160, "[i]t is well settled . . . that the Board may issue a bargaining order even if the Union represents only a minority when the order is entered," *Justak,* 664 F.2d at 1082 (citing *Gissel,* 395 U.S. at 610). Where, as here, the employer's misconduct is pervasive and likely to persist despite employee turnover, a bargaining order still may better preserve and foster employee free choice than other, traditional remedies. *Id.; see also Amazing Stories, Inc. v. NLRB,* 887 F.2d 328, 331 (D.C. Cir. 1989), *cert. denied,* 494 U.S. 1029 (1990). Moreover, it appears that even if the employees have changed, Q-1's management remains the same. Thus, repetition of the illegal practices appears more likely here than in *Montgomery Ward,* where only one of thirteen managers remained, *see* 904 F.2d at 1160, or than in *Impact Industries,* where among the changed circumstances deemed relevant was the fact that the management had completely changed, *see* 847 F.2d at 383.

and pervasive campaign on the part of Q-1 to prevent its employees from exercising their rights to unionize under the National Labor Relations Act. Q-1 management expressed open hostility to the organizational efforts and to the organizers themselves—impermissibly coupling their expressions of views with threats of reprisal and with actual retaliation. Such conduct constitutes a blatant violation of sections 8(a)(1) and 8(a)(3) of the Act. We see no abuse of the Board's discretion in its determination that a fair election would not be possible at Q-1 and that a bargaining order is necessary. Accordingly, we *deny* Q-1's petition for review and *enforce* the Board's order.

ENFORCED.

COFFEY, *Circuit Judge,* dissenting. "We will not overturn an ALJ's credibility determinations absent extraordinary circumstances. These [extraordinary circumstances] include a clear showing of bias by the ALJ, utter disregard for uncontroverted sworn testimony, or acceptance of testimony which on its face is incredible." *Central Transport, Inc. v. National Labor Relations Bd.*, 997 F.2d 1180, 1190 (7th Cir. 1993) (citing *NLRB v. Advance Transp. Co.*, 979 F.2d 569, 573 (7th Cir. 1992); *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 407 (7th Cir. 1992)). The law is equally clear that we will affirm the Board's findings of fact if they are supported by "substantial evidence on the record considered as a whole." *Central Transport*, 997 F.2d at 1184. In most cases, an ALJ's credibility findings would withstand a challenge that he was biased if the findings were supported by substantial evidence. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *Kopack v. NLRB*, 668 F.2d 946, 952-54 (7th Cir., *cert. denied*, 456 U.S. 994 (1982). In this case, the respondent-appellant, Q-1 Motor Express, presents a compelling argument that the ALJ was in fact biased because the ALJ reached the exact opposite conclusion regarding the credibility of the witnesses than did the experienced U.S. district court judge who, after hearing testimony in open court from the same principal

witnesses, *see infra* note 2, refused to grant the NLRB a preliminary injunction pending the outcome of the administrative hearing.[1]

I realize that the factual findings made by a trial judge in a 10(j) injunctive proceeding are not binding on the ALJ or the Board, *National Labor Relations Bd. v. Acker Indust., Inc.*, 460 F.2d 649, 652 (10th Cir. 1972), however, it causes me concern when an experienced U.S. district judge and an NLRB administrative law judge reach such conflicting conclusions as to witness credibility after hearing the testimony of essentially the same witnesses.[2] Following the testimony of the truck drivers and the Q-1 management, the U.S. district judge stated, "Generally, this court finds that Q-1 Motor Express' witnesses were more credible than the petitioner's witnesses; the drivers' testimony appeared to the court to have been 'scripted,' having been uniform in many details that would otherwise naturally yield to certain inconsistencies, and less than candid." The ALJ, without giving an explanation as to why his credibility findings were directly opposed to those of the respected trial judge, credited the testimony of the drivers over that of Q-1 President Schroering throughout his decision. This inconsistency is especially troublesome in light of the fact that the hearing before the district judge occurred several months prior to the hearing before the ALJ and thus the witnesses' memory and recollection of events, under usual circumstances, would be clearer and much more vivid when they testified in district court.

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[1] Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j), permits a party to seek injunctive relief pending final Board action. In this case, the NLRB sought to enjoin Q-1 from engaging in further unfair labor practices and to require Q-1 to reinstate the three wrongfully discharged employees.

[2] As mentioned in the majority opinion we lack a transcript of the 10(j) proceeding, but the U.S. district judge made express reference to the testimony of James E. Schroering, president of Q-1; Donald R. Denham, Dan W. Stevens, and Anthony Lupo, the discharged Q-1 drivers; Leah Conrad, the Q-1 dispatcher; her husband Mark Conrad, who was another Q-1 driver; as well as James Hogan, another Q-1 driver. The NLRB brief before this court only listed three witnesses that testified before the ALJ that did not testify in district court: Homer and Sandra Longoria and Shirley Glisson.

In addition to the variance in the credibility findings, there were several findings made by the ALJ suggesting that he was in fact biased against Q-1 management. The Board properly "disavowed" each of these findings, yet affirmed the ALJ's holding against Q-1. For instance, the ALJ based his decision against Q-1, in part, on six violations of § 8(a)(1) that the NLRB did not even allege in its complaint. The Board dismissed the ALJ's six additional findings against the employer because Q-1 did not have fair notice of these alleged violations. The fact that the ALJ went far beyond the complaint in search of additional violations against the employer strongly infers that he was less than objective about the NLRB's case. Second, the ALJ found one § 8(a)(1) violation against Q-1 based on dispatcher Leah Conrad's report to President James E. Schroering that union cards were being distributed. The Board disavowed this finding because both Conrad and Schroering were supervisors and there were no employees (truck drivers attempting to unionize) present at the time the conversation occurred. Since no employees were present, the Board ruled the comments could not constitute an attempt to "interfere with, restrain, or coerce employees in the exercise of the right[]" to organize. 29 U.S.C. § 158(a)(1). Once again, this finding, which the Board disavowed, reveals the ALJ's potential bias against Q-1. Third, the ALJ concluded that because James E. Schroering consulted his attorney before discharging Donald Denham it "suggest[ed] that [Schroering] was plotting his course carefully from the outset," i.e., that he was seeking to disrupt attempts at unionizing without running afoul of the law. The Board rejected this finding because merely seeking the advice of counsel before discharging an employee does not suggest antiunion animus but rather is a sound business decision in this climate of increasing employee lawsuits against employers. The fact that the ALJ interpreted Schroering's consulting with his attorney as an indication of the president's hostility toward the union is further evidence that the ALJ viewed the record with a jaundiced eye. Finally, the Board disavowed, without elaboration, the ALJ's finding that there was a § 8(a)(5) violation as of May 19, 1991.

These four express instances of the Board rejecting the findings of the ALJ (each finding against Q-1), provide additional evidence that the ALJ had a bias against Q-1. He was not satisfied with the NLRB's case against Q-1 so he took it upon himself to manufacture more charges and construe the evidence in the light most unfavorable to Q-1 rather than in a neutral and impartial fashion.

Based on the irreconcilable credibility findings of the district judge and the ALJ as well as the four instances of bias (which the Board "disavowed"), I would reverse the Board's order and remand for a new factual hearing in front of a different, impartial ALJ. When considering the totality of the evidence, as we must, the evidence of bias certainly casts doubt on his decision. At the very least, a remand is necessary for the Board to expalin why it accepted the ALJ's credibility findings without even referring to the trial court's credibility findings. Although the result after remand might very well be the same, the appellant is entitled to have its day in court and receive an explanation from the Board as to how it reconciled these inconsistent findings. In our judicial system, "justice must satisfy the appearance of justice" and administrative agencies, as well as administrative law judges, must avoid even the appearance of bias or partiality. *In re Murchison,* 349 U.S. 133, 136 (1955).

DISSENT.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

AGENCY JUDGMENT
With Oral Argument

Date: May 25, 1994

BEFORE: **Honorable** DONALD P. LAY, Circuit Judge*
Honorable JOHN L. COFFEY, Circuit Judge
Honorable ILANA DIAMOND ROVNER,
Circuit Judge

No. 93-1746

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

Q-1 MOTOR EXPRESS, INCORPORATED,
Respondent

Application for Enforcement of an order of the National Labor Relations Board Nos. 9-CA-28654-1, 9-CA-28654-2, 9-CA-28654-3 and 9-CA-28762

IT IS ORDERED AND ADJUDGED by this court that the order of the National Labor Relations Board, is ENFORCED, with costs, in accordance with the decision of this court entered this date.

* The Honorable Donald P. Lay, Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

(1064-012594)

APPENDIX C

SDR

308 NLRB NO. 185

D-3185
Clarksville, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Q-1 MOTOR EXPRESS, INC.

and

DONALD RAY DENHAM, DAN W. STEVENS, AND ANTHONY LUPO, Individuals — Cases 9-CA-28654-1 -2, and -3

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO — Case 9-CA-28762

DECISION AND ORDER

Exceptions filed to the judge's decision in this case[1] present issues regarding whether the Respondent, in the context of a union organizing campaign, committed violations of Section 8(a)(1) and (3) of the Act and whether a bargaining order is warranted to remedy the unfair labor practices.

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[1] On March 11, 1992, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and brief and has decided to affirm the

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[2] On May 20, 1992, the Respondent filed a motion requesting the Board to reopen the record in this case to include the transcript of the 10(j) proceeding in this case before the United States District Court, Southern District of Indiana, Indianapolis Division. The General Counsel filed a brief in opposition to the Respondent's motion, and the Respondent filed a reply brief. We deny the motion.

Contrary to the Respondent's contention, the transcript of the 10(j) proceeding is neither newly discovered evidence nor evidence which has become available since the close of the hearing. The hearing in the 10(j) proceeding was held on October 9, 16, and 21, 1991, and the instant unfair labor practice hearing was held on December 2, 3, and 4, 1991. The Respondent received the first two volumes of the transcript from the 10(j) proceeding before the close of the instant hearing but made no attempt to introduce them into evidence. Further, the third and final volume of the 10(j) proceeding was mailed to the Respondent on December 2, 1991. Even if, as the Respondent contends, it did not receive it prior to the close of the instant hearing, it made no motion to the judge to admit the transcript, although it attached a copy of the district court's decision to its posthearing brief to the administrative law judge. Under these circumstances, the Respondent clearly knew of the existence of the transcript of the 10(j) proceeding at the time of the instant hearing, and thus this transcript can not now be deemed to constitute newly discovered evidence or evidence which has become available only since the close of the hearing under Section 102.48(d)(1) of the Board's Rules and Regulations.

Further, introduction into evidence of the transcript of the 10(j) proceeding would not require a different result than that reached by the administrative law judge, as also required by Sec. 102.48(d)(1) of the Board's Rules and Regulations. The fact that the administrative law judge reached different credibility resolutions than the district court judge does not invalidate the credibility resolutions of the administrative law judge, who is entitled to base his resolutions on the record evidence in the hearing before him. *See NLRB v. Pacific Intermountain Express Co.*, 228 F.2d 170, 176 (1955).

judge's rulings, findings,[3] and conclusions as modified, and to adopt his recommended Order, as modified.

1. The complaint alleged that the Respondent violated Section 8(a)(1) in nine separate instances.[4] The judge found the violations as alleged, and we agree with these findings for the

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[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolution unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that the judge's rulings and conduct of the hearing demonstrated bias against the Respondent. Our review of the record reveals no evidence that the judge prejudiced the case, made prejudicial rulings, or demonstrated any bias against the Respondent.

The judge incorrectly stated that Anthony Lupo came to the Respondent's office to pick up his last paycheck on June 1, 1991, rather than June 17, 1991. We find that this inadvertent error does not affect the validity of his findings.

We disavow the judge's statement that the fact that the Respondent's president James E. Schroering (JE) sought legal advice before discharging employee Donald Ray Denham "suggests that he was plotting his course carefully from the outset."

[4] The nine instances alleged in the complaint are: (a) Supervisor Leah Conrad told employee Lupo that management was aware that union cards were being distributed and that Lupo should stay away from those who were involved if he knew what was good for him; (b) JE told employee Denham that he had learned from another employee that Denham was the one who was passing out union cards; (c) JE told Denham that the Respondent would have to fire its drivers, close down, and hire all new drivers; (d) JE told Denham that no "half-ass union" would come in and tell him how to run his business and that he would close the doors and open under a new name; (e) the Respondent awarded employees a pay raise of 1 cent per mile; (f) JE promised at an employee meeting in response to an employee request that he would put Lupo on the drivers' list as a regular full-time employee; (g) JE told employee Stevens that he knew the identities of everyone who had signed a union card; (h) JE told Stevens that he would be willing to fire all of his employees if that was what it took to keep the Union out; and (i) JE told Lupo that the Respondent was not a union company and if he were Lupo, he would not worry about missing out on dispatches because Lupo was on the way out.

reasons set forth by him. The judge, however, found six[5] additional 8(a)(1) violations which were not alleged in the complaint,[6] and the Respondent excepts to these findings. We find merit in the Respondent's exceptions.

It is undisputed that the six additional 8(a)(1) violations were not alleged in the complaint, nor did the General Counsel seek to amend the complaint at the hearing to include these violations. Further, the General Counsel made a statement at the hearing indicating that evidence regarding these additional instances was adduced as background for the alleged incidents,[7] and he did not contend in his posthearing brief to the judge that these instances constituted additional violations of Section 8(a)(1). Under these circumstances, we find that the Respondent did not have fair notice that the judge would make findings of violations of the Act based on these unalleged instances. Therefore, these instances were not fully and fairly litigated at the hearing. *See Cafe La Salle*, 280 NLRB 379, 382 (1986); *Seaward International*, 270 NLRB 1034 (1984).

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[5] Although the judge's decision says that there were seven 8(a)(1) violations not alleged in the complaint, he twice mentioned the same incident involving JE's statement to employee Hogan that unionization would bring a policy of forced dispatch into the Respondent.

[6] The six additional 8(a)(1) violations found by the judge are based on the following incidents: (a) Conrad informed JE that union cards were being distributed and that Denham was involved with the distribution; (b) Conrad told employee Hogan, in the presence of her husband, also an employee, that she would hate to see her husband join the Union because he would have to find another job; (c) JE told Denham that he had called Denham's previous employer and learned that Denham had been a member of the Union for 10 years; (d) JE called Longoria, the wife of an employee, and asked her what she knew about the employees' union activities; (e) JE told Longoria that her husband had gotten himself "in a fix" because of his union activities and suggested that the Respondent might take an adverse personnel action against him because of an old accident; (f) JE told employee Longoria that he was not going to let the Union come in and destroy everything he and his father had built and that he could turn the Respondent over to a sister company; and (g) JE told Hogan that unionization would bring a policy of forced dispatch into the Respondent.

[7] In response to the Respondent's objection to the admission of evidence pertaining to one of the incidents not alleged in the complaint, the General Counsel stated, "This proves, if nothing else, knowledge and animus."

Accordingly, we dismiss these additional 8(a)(1) findings made by the judge.[8]

2. Although we have dismissed certain of the 8(a)(1) findings made by the judge, we find, in agreement with the judge, that a *Gissel*[9] bargaining order is warranted to remedy the remaining unfair labor practices found by the judge and which we adopt for the reasons set forth by him.

Shortly after the employees began their organizing activities on behalf of the Union, the Respondent began its campaign of threats and intimidation of employees designed to undermine the Union's strength. Thus, the Respondent's president James E. Schroering (JE) and Supervisor Leah Conrad created the impression of surveillance of the employees' union activities by telling employees that they knew that union cards were being distributed and that they knew which employees were passing out and signing the cards. Further, JE threatened to discharge the employees and close down the facility to keep out the Union and Conrad threatened an employee with unspecified reprisals if he engaged in union activities. In addition, the employees received a pay raise of 1 cent per mile and JE promised to adjust a grievance to discourage union activities. Finally, the Respondent discharged three employees because of their union activities.

We have emphasized, with court approval, that threats of plant closure and discharge not only are "hallmark" violations but are "among the most flagrant' of unfair labor practices." *Action Auto Stores*, 298 NLRB 875 (1990) (citing *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301-1302 (6th Cir. 1988), enfg. 287 NLRB 796 (1987)). The coercive effect of these threats are especially great in this case because they were communicated by the Respondent's president and commenced soon after the advent of the

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[8] We also note that the judge erred in finding that Conrad's statement to JE that union cards were being distributed constituted a violation of Sec. 8(a)(1). Because this conversation took place between two supervisors and was not made in the presence of any employees, we find no violation of the Act.

[9] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

union on the scene. *See Somerset Welding & Steel*, 304 NLRB No. 21 (Aug. 13, 1991). In addition, the Respondent unlawfully granted a wage increase to all the employees, and unlawfully promised to remedy a grievance.

Moreover, the Respondent violated Section 8(a)(3) of the Act by unlawfully discharging three bargaining unit members. We find that these 8(a)(1) and (3) violations, which threaten the very livelihood of employees, are likely to have a lasting impact which is not easily erased by the mere passage of time or the Board's usual remedies, especially given the small size of the bargaining unit and the fact that the unfair labor practices affected each of the employees. *See Action Auto Stores*, supra. Finally, we find, contrary to the Respondent's contention, that evidence concerning employee turnover is an irrelevant consideration when assessing the propriety of issuing a *Gissel* bargaining order and, even if considered, would not require a different result. *See F&R Meat Co.*, 296 NLRB 759 (1989). Accordingly, we agree with the judge that the possibility of erasing the effects of the Respondent's extensive and serious violations is slight and the holding of a fair election unlikely. Therefore, we conclude that a *Gissel* bargaining order is appropriate.[10]

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[10] The judge found that May 19, the date the Union obtained majority status, rather than July 18, the date the Union demanded recognition, is the appropriate date to use for the remedial order, because such an order is a remedy for an 8(a)(1) violation, not an 8(a)(5) violation. He also found that the Respondent violated Sec. 8(a)(5), as well as Sec. 8(a)(1), as of May 19. No 8(a)(5) violation can be found as of that date, however, because no demand had as yet been made, a critical element for making such a finding. *Trading Port*, 219 NLRB 298, 300 (1975). Further, we disavow his statements to the effect that they imply that July 18 would not be the appropriate date for finding an 8(a)(5) bargaining order as a remedy for the Respondent's unlawful conduct. Nevertheless, we shall not disturb his finding May 19 to be an appropriate date for the remedial bargaining order given here. No exceptions have been taken by the General Counsel or the Charging Party to his failure to find a violation of Sec. 8(a)(5) based on the July 18 demand. Moreover, Sec. 8(a)(5) is not a sine qua non for a remedial bargaining order and an 8(a)(5) violation would not add to the remedy in this case. *See Peaker Run Coal Co.*, 228 NLRB 93, 94-95 (1977).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Q-1 Motor Express, Inc., Clarksville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.

2. Substitute the following for paragraph 1(e).

"(e) Threatening employees with unspecified reprisals for engaging in union activities."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 30, 1992.

James M. Stephens, Chairman

Dennis M. Devaney, Member

John N. Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT create in the minds of our employees the impression that their union activities are the subject of company surveillance.

WE WILL NOT grant pay increases and promise to adjust grievances in order to discourage union activities.

WE WILL NOT threaten to discharge employees or to close the terminal in order to discourage union activities.

WE WILL NOT threaten employees with unspecified reprisals for engaging in union activities.

WE WILL NOT discharge employees or otherwise discriminate against them in their hire or tenure in order to discourage their support for General Drivers, Warehousemen & Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL-CIO, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with General Drivers, Warehousemen & Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of all the full-time and regular part-time drivers and driver mechanics employed at our Clarksville, Indiana terminal, exclusive of office clerical employees and supervisors as defined in the Act.

WE WILL offer full and immediate reinstatement to Donald Ray Denham, Dan W. Stevens, and Anthony Lupo to their former or substantially equivalent employment, and WE WILL make them whole for any loss of pay which they have suffered by reason of the discrimination practiced against them, with interest.

WE WILL remove from our files any references to the unlawful discharges and disciplinary actions taken against Donald Ray Denham, Dan W. Stevens, and Anthony Lupo, and WE WILL notify them in writing that this has been done.

Q-1 MOTOR EXPRESS, INC.

_____
(Employer)

Dated _____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street, Room 3003, Cincinnati, Ohio 45202-3271, Telephone 513-684-3663.

APPENDIX D

JD–61–92
Clarksville, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Q-1 MOTOR EXPRESS, INC.

and

DONALD RAY DENHAM, DAN W. STEVENS, AND ANTHONY LUPO, Individuals	Cases 9–CA–28654–1, –2, –3
GENERAL DRIVERS, WAREHOUSEMEN & HELPERS LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO	Case 9–CA–28762

James E. Horner, Esq., for the General Counsel
I. Joel Frockt, Esq., of Louisville, Kentucky, for the Respondent.

DECISION

I. Findings of Fact

A. Statement of the Case

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before the undersigned at Louisville, Kentucky, upon an amended consolidated unfair labor practice

complaint,[1] issued by the Acting Director of the Board's Ninth Region, which alleges that Respondent Q-1 Motor Express, Inc.[2] violated Section 8(a)(1), (3), and (5) of the Act. More particularly, the Amended Consolidated Complaint alleges that the Respondent coercively interrogated employees concerning their union activities, threatened to close its plant in reprisal for the union activities of employees, informed employees that it would be futile for employees to select the Union as their bargaining agent, threatened employees with more onerous terms and conditions of employment if they unionized, created the impression that the union activities of employees were the subject of Company surveillance, threatened to fire employees who signed union cards, informed an employee that he was being denied work opportunities because of his union activities, granted a wage increase and promised to designate a part-time driver as a full-time driver in order to dissuade employees from supporting the Union, and discharged Charging Parties Donald Ray Denham, Dan W. Stevens, and Anthony Lupo because of their union activities. The Consolidated Amended Complaint also alleges that the Respondent failed to bargain in good faith with the majority

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[1] The principal docket entries herein are as follows:

Charges filed herein by Donald Ray Denham, Dan W. Stevens, and Anthony Lupo against the Respondent in Cases 9--CA--28654--1, --2, --3, respectively, on June 12, 1991; Charge filed herein by General Drivers, Warehousemen & Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL--CIO, against the Respondent in Case 9--CA--28762, on July 18, 1991; Consolidated Complaint issued against the Respondent by the Acting Director, Region 9, on July 23, 1991, and amended on August 14, 1991; Respondent's Answer filed on August 7, 1991, and amended on August 26, 1991; Hearing held in Louisville, Kentucky, on December 2, 3, and 4, 1991; Briefs filed with the undersigned by the General Counsel and the Respondent on or before January 6, 1992.

[2] The Respondent admits, and I find, that it is a corporation which maintains an office and place of business at Clarksville, Indiana, and is engaged in the interstate transportation of freight by motor carrier. In the course and conduct of this business, it has performed services valued in excess of $50,000 in states other than Indiana. Accordingly, it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

representative of its employees. The Respondent denies the commission of any independent violations of Section 8(a)(1) of the Act, asserts that Denham, Stevens, and Lupo were discharged for job-related deficiencies, including a failure to make themselves available for dispatch, and contends that it had no duty to bargain collectively with the Union since, at the time the Union made its demand for recognition, the Union did not represent a majority of the Respondent's employees in an appropriate bargaining unit. Upon these contentions the issues herein were joined.[3]

B. The Unfair Labor Practices Alleged

The Respondent is a small family-owned trucking company with a very short corporate history. It is owned by James J. Schroering (JE), its president, and his father, James J. Schroering, Jr. (JJ), its vice president. It maintains a truck terminal on Old Potters Lane in Clarksville, Indiana, and an office on South Broadway in the same city.[4] Respondent has only one customer, the A.O. Smith Company of Milwaukee, Wisconsin. Utilizing trailers owned by the corporation and tractors rented from the Ryder Corporation, it has hauled automobile frames since early 1990 from the A.O. Smith plant in Milwaukee to the A.O. Smith plant in Corydon, a small town in southern Indiana located about 18 miles from Clarksville. After most of the events in this case took place, the Respondent began hauling automobile frames for A.O. Smith on another route running from Milwaukee to the A.O. Smith plant at

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[3] The transcript herein is corrected as follows:

1. On p. 65, L. 1, change "and" to "in"
2. On p. 65, L. 2, change "eight" to "in"
3. On p. 68, L. 5, change "New Orleans" to "Milwaukee"
4. On p. 133, L. 8, place a period after "case" and capitalize "In"
5. On p. 514, L. 24, change "or demand" to "a demand"
6. On p. 515, L. 2, change "regards the" to "majority"
7. On p. 515, L. 11, change "clerks" to "courts"
8. On p. 659, L. 12, insert "not" after "would"

[4] Clarksville is actually part of the metropolitan Louisville area and is located on the north side of the Ohio River just a few minutes' drive from downtown Louisville.

Bellevue, Ohio, a city located in northern Ohio halfway between Toledo and Cleveland. Bellevue is about 300 miles from Clarksville.

Respondent's over-the-road drivers at Clarksville are dispatched by Leah Conrad, an admitted supervisor, who works at the South Broadway office but frequently takes calls at her home from drivers who are on the road. Her husband, Mark Conrad, is employed by the Respondent as a driver. Over-the-road drivers are compensated exclusively on a mileage basis, except for occasional payments they receive for so-called detention time, i.e., undue amounts of delay experienced while loading at the A.O. Smith plant in Milwaukee. Regardless of mileage actually driven, the number of miles for which they are paid on standard runs was set by A.O. Smith in its contract with the Respondent. As a motor carrier operating in interstate commerce, the Respondent is governed by administrative regulations issued by the U.S. Department of Transportation (DOT). The regulations principally involved in this litigation are the DOT requirement that all over-the-road drivers maintain and turn in for audit detailed logbooks showing the amounts of time they spending in driving. These logs are required to permit government monitoring of two other DOT regulations, one which prohibits any over-the-road driver from operating a motor vehicle more than 70 hours in any eight-day span and another which requires that every such driver take a rest period of at least eight consecutive hours after any ten-hour stretch of driving.

The Respondent is obligated to make a truck available for loading at the A.O. Smith plant in Milwaukee at scheduled hours throughout each day, Monday through Friday. On rare occasions, loadings have taken place on Saturday or Sunday but, since A.O. Smith is a unionized plant, such activity on its part requires the payment of overtime and is therefore discouraged. Like many suppliers in the automobile industry, A.O. Smith operates on a "just in time" basis. "Just in time" means that deliveries of parts and equipment to major automakers are made "just in time" for use in the final assembly, thereby saving the automaker the cost of large inventories. The "just in time" program puts pressure on suppliers

and deliverymen to make prompt pickups and immediate deliveries. Scheduled pickup times each weekday in Milwaukee were at 9 a.m., 1 p.m., 5 p.m., 9 p.m., and occasionally at 11 p.m. To meet this schedule, the Respondent organized four or five teams of drivers who make runs from southern Indiana to Milwaukee in a relay system known as slip seating. A driver leaves the terminal at Clarksville, drives 385 miles to Milwaukee, and waits to be loaded. He then returns to the A.O. Smith plant at Corydon, a trip of about 415 miles, unloads, and returns his truck to the Ryder terminal in Clarksville, where the truck is gassed up and made ready for a return run. The returning driver then takes the truck to the Respondent's terminal, about a mile from the Ryder location, where his partner slip seats, i.e., takes over for an immediate return to Milwaukee and a repeat of the same scenario.

Normally drivers do two or three runs a week. There have been instances where drivers have made four round trips in a single week and frequent instances where drivers have made back-to-back runs, without any rest interval at home. The time it takes for a round trip has been estimated at from 19 to 25 hours, depending on the very flexible amounts of time spent in loading at Milwaukee and unloading at Corydon. Normal running time is about 7-1/2 to 8 hours in each direction. However, there are variables, such as weather, traffic in and about Chicago, and breakdowns which can extend that time.

The Respondent has an agreement with the A.O. Smith Company that the latter will reimburse the Respondent, at the rate of $7.50 an hour, for any delays, known as detention time, in excess of two hours experienced by a driver while loading at Milwaukee,[5] but the Respondent, fearing to antagonize its only

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[5] In the customer's yard in Milwaukee, A.O. Smith employees are responsible for stacking auto frames on the trailer of the Respondent's vehicle. The Respondent's drivers are responsible for chaining down the frames onto the trailer and for drawing the canvas curtains along the sides of the trailer which serve to enclose the load. At Corydon, a return trip is occasionally delayed because a driver is called upon to load and secure baskets or crates which have accumulated at

(continued...)

customer, had been reluctant until recently to press A.O. Smith for detention payments. The Respondent's individual agreements with its drivers provide that, unless it is reimbursed by the customer for detention time, the driver will not receive any money for excessive time lost in loading. However, after the events in this case arose, the Respondent altered its policy and began to pay detention time when claimed by a driver, regardless of whether the claim had been reimbursed by its customer. Throughout the course of a trip, a driver is required to call in to Leah Conrad at various intervals to let her know where he is and when he may be expected to return to Clarksville so that she can alert his slip seat partner as to when to be available for a return run to Milwaukee. While there is a dispute in the record between employee and management witnesses, I conclude that it is virtually impossible to execute a round trip between Clarksville and Milwaukee in the time allotted by the Respondent and still comply with DOT regulations, except for the first run of the week, when a driver can leave southern Indiana at an hour chosen by him, arrive in Milwaukee in time to take eight consecutive hours of rest before being loaded, and thereafter directly return to Corydon. I further conclude that few drivers did in fact make this round trip in full compliance with DOT regulations, except for the first round trip of the week. Several drivers testified credibly that it was their regular practice to falsify log cards to conceal the fact that they were running illegally. I further conclude that the Respondent was well aware of this practice and not only condoned it but virtually insisted upon it in order to cut the corners which had to be cut to complete the runs the Respondent had to make with the limited number of drivers and trailers it was employing.[6]

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[5](...continued)
Corydon and which must be returned to Milwaukee.

[6] Drivers' logs regularly failed to match the time entered on the Respondent's dispatch sheets and on the trip tickets turned into Ryder at the end of each trip. In September 1990, driver James Hogan had a discussion about illegal logs in the Company office with JE. He asked JE how he could be expected to turn in a legal log "when you run me illegal?" JE simply replied, "You can be easily

(continued...)

An effort to organize the Respondent's employees began in the first week in May when discriminatee Donald Ray Denham contacted Union Business Agent Jerry Shaw in Louisville and told him that the Respondent's employees were interested in unionizing. Denham was, at that time, the Respondent's senior driver, having started to work on February 6, 1990, not long after the Respondent commenced operation.[7] Denham obtained union authorization cards and began disseminating them among Company drivers in various ways. The Company's over-the-road drivers rarely congregated in

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[6](...continued)
replaced." Former driver Homer Longoria testified credibly that, at his hiring-in interview, JE told him that he knew that drivers could not make any money if they "ran legal" and the Company could not make any money either under those circumstances, so all that JE asked was that drivers turn in logs that appeared to be legal. Longoria followed that advice, keeping two sets of logs on his trips, one which reflected his actual time on the road and the other which reported time on the road which complied with DOT regulations. Early in Stevens career as a driver, he complained to JE about the difficulty he was experiencing in keeping accurate logs which were also legal logs. JE told Stevens that, if he wanted to keep two sets of logs, he could do so, adding that there were plenty of logbooks in the Company office. He also told Stevens that, if he did not want to do so he could look for another job. JE said on that occasion that drivers were the least valuable asset the Company had and could be replaced as easily as a tire on a truck.

[7] Respondent insists that it does not observe seniority. Driver Shirley "Tex" Glisson testified that the Respondent observes seniority when it serves the Respondent's purpose to do so. The Respondent did post and maintain at the Company office a list of drivers arranged in order of date of hire. The list was not entitled "seniority list" but was referred to as such. I credit testimony in the record that the Respondent did observe seniority in practice when it made dispatches. The parties agree that the Respondent did not observe the practice of "forced dispatches." Driver were free to turn down a run which was offered them and they often did. In such instances, the dispatcher offered the open run to the next available driver on the seniority list. The name of discriminatee Anthony Lupo appeared on the list as a casual driver. He was actually a regular part-time driver and was dispatched at least once each week. Often he received more assignments, filling in for regular drivers who were ill or on vacation. The principal distinction between so-called regular drivers and casual drivers was not the number of hours worked in a given week but simply that those who enjoyed regular status received health insurance benefits after 90 days of employment and those denominated as casuals did not.

leaving them in private pickup trucks, at drivers' homes, or during casual encounters along Interstate 65, the principal route used on trips to and from Milwaukee. A total of eight authorization cards were signed by Company drivers on or before May 19.[8] Denham gave several cards to Glisson for distribution among drivers who lived on the Indiana side of the Ohio River. He personally gave cards to Starcher, Stevens, and Longoria. He collected a signed card from Stevens and gave it and other cards to Lupo to be turned in to the Union.

One of the cards was given to Mark Conrad, the husband of Leah Conrad. Mrs. Conrad informed JE that cards were being distributed and also told him that Denham was involved with the Union. Mark Conrad was one of three drivers in the bargaining unit who did not execute a card. JJ testified that he had learned from an employee of Ryder that union cards were being distributed among Company drivers and had passed this information along to his son. About a week after signing a card on May 10, Lupo had occasion to call Mrs. Conrad on a business-related matter. During the conversation, Mrs. Conrad told Lupo that Company management was aware that Union cards were being distributed and, if Lupo knew what was good for him, he would stay away from those who were involved in this effort. On or about May 18, Hogan visited the Conrad home to pick up his paycheck. Both Conrads were present. Mark Conrad asked Hogan what he thought about the passing out of Union cards and whether he was going to join. Mrs. Conrad then entered the conversation to say that she would hate to seek Mark join the Union because, if he did, he would have to find another job, adding that, "if the Union got in . . . Q-1 could not stand union pressure."

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[8] The record contains authorization cards signed by Denham, Glisson, Lupo, Stevens, Martin E. Suddeth, Todd E. Tomes, and Hogan. Homer Longoria testified credibly that he executed an authorization card sometime before the Company meeting which was held on May 19. However, his card was misplaced and was not offered.

When Denham arrived at the Ryder truckstop in Clarksville on the afternoon of May 17 to gas up his truck, he was met by JE. I credit Denham's testimony relating to his conversation with JE. It was corroborated in part by Lupo, who heard part of the conversation while he was in the area gassing up his own truck. JE told Denham that he had already talked with Homer Longoria and that he knew that Denham was the one who was passing out Union cards. JE also told Denham that he had spoken with his attorney and learned that he would have to fire all the drivers, something he did not want to do because it would mean losing people like Mark Conrad and Jim Logsdon, but he would have to do so in order to close the Company down and reopen it. He told Denham he would fire all the drivers and hire all new drivers and could do so within 72 hours. Denham replied simply that he was tired and did not want to argue; he just wanted to go home. JE persisted, telling Denham that he would not permit "no half-ass union to come in and try to tell him how to run his business" and before he would let this happen, he would "close the doors first and open up under a new name." JE also said that he felt that the drivers had betrayed him and informed Denham that he had called Denham's previous employer and learned that Denham had been a member of the Teamsters Union for ten years. He further informed Denham that he was holding a drivers' meeting the following Sunday afternoon at 5 p.m. and knew that the drivers themselves were planning to hold their own meeting an hour earlier. He said he had considered attending the drivers' meeting but had changed his mind, adding, "You all go ahead and have your meeting, and then, when you come down, we'll have our meeting."

On the same afternoon, JE phoned Sandra Longoria, the wife of driver Homer Longoria, who was out of town on a run to Milwaukee.[9] JE began to ask Mrs. Longoria, who suffers from a chronic intestinal disorder known as Crohn's Disease, about the

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[9] I credit the straightforward testimony of both Longorias. Homer Longoria is no longer employed by the Respondent, having found employment driving for another motor carrier. Neither of them would have any personal motive for exaggerating or falsifying their testimony.

organizing drive. He told her that all the men were talking about the Union and wanted to find out what she knew about it. Mrs. Longoria replied that her husband had said something about the Union but she did not know what it was all about. She then asked JE whether he was calling the wives of the other drivers. JE replied that in fact he was but refused to tell her which wives he was calling. He then told her that her husband was up to his knees in Union business and had really gotten himself "in a fix." Mrs. Longoria asked JE "What do you mean?" and accused him of making an unethical phone call. JE went on to remind her that, when her husband had been in an accident the previous October, the Company had kept him on the payroll even though another trucking company would not have done so. He added that the Company would now have to rethink its position. She objected, saying "I cannot believe that you are making this phone call." JE replied that he wanted to find out about "this Union business" and why the men were so upset. Mrs. Longoria replied that one reason was that the Company was not paying detention pay. They argued, JE saying that the men were receiving all the detention pay they were entitled to receive and Mrs. Longoria disagreeing. She then accused him of making promises to drivers that he had no intention of keeping and suggested that this was why the drivers were upset. Mrs. Longoria then asked JE whether his father knew that he was making this phone call. When he replied that JJ did not know about it, she then asked JE for his father's phone number. She told JE that she did not take kindly to the fact that he had called her, knowing that her husband was out of town, and that he had tried to pump her for information. She then hung up.

Having become upset, Mrs. Longoria began to suffer an attack of her long-term illness. After calming down, she called JJ, told him the substance of the conversation she had with his son, and objected to his son's behavior. JJ replied that "we don't do business like that" and insisted that his son had not in fact made the phone call. She replied that the maker of the phone call was his son, pointing out that the caller had identified himself as such and that he knew a great deal about Longoria's work history and record as an employee. JJ's response was that this information was all in the

Company computer and anyone could have obtained it from that source. He also told her that the Company had no problem with the unionization of its employees and suggested that possibly a Union representative had made the phone call about which she was complaining and was trying to put the blame for it on the Company. He then said he would get a court order to have everyone's phone tapped in order to get to the bottom of the question and cautioned her to be careful about making accusations such as the ones she had just made. He asked her to have her husband call him.

Mrs. Longoria reported this conversation to her husband when he phoned her while he was out on his run. Upon returning to Clarksville about midnight, Longoria phoned JE and angrily complained about the call to his wife. He told JE that the latter had no business involving members of his family in Company business and informed him that his wife's health was precarious, and complained to him that incidents involving stress served only to bring on renewed attacks. JE replied that he did not know much about the Union and was also unaware that Mrs. Longoria suffered from Crohn's Disease. He went on to say that he and his father had started the Company, had taken all of the risks incident to opening a new business, and that he was not going to let the Teamsters come in and destroy everything they had done. He mentioned to Longoria that the Schroerings owned a sister company and that he could turn Q-1 over to the sister company.

The following morning, Longoria went to the Company office and spoke with JJ. Again he voiced a strong objection to what had transpired the day before. He told JJ he was sure that it was JE who had made the call since he had stated things to his wife concerning Longoria's work record that only JE would know. He insisted that JJ call his wife and apologize. JJ did so in Longoria's presence.[10]

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[10] While the Schroerings persisted for a while with the contention that JE had never phoned Mrs. Longoria and that the caller must have been someone else, on the following Sunday evening, following the Company meeting with the drivers, JE spoke to Longoria privately and apologized for the call.

At or about this same point in time, JE had occasion to speak about the Union to Hogan. He told Hogan that he might have to shut the Company down and start it over because the Union would break him.

Two meetings took place Sunday afternoon, May 19. Eight drivers met informally in a group at the Union-76 truckstop on I-65 at Hamburg, Indiana, a few miles north of Clarksville.[11] At that point, Denham told the group that he had in hand authorization cards signed by a majority of the employees and said that he had contacted the Teamsters to tell them that "we had elected Local 89 as the bargaining representative." Reference was then made to a want-ad for drivers which had appeared the same day in the Louisville *Courier-Journal.* The ad read:

> Drivers
> Q-1 Motor Express is now Hiring.
> Offering
> — 23 cents per mile
> — 2,300 miles per week
> — late model conventionals
> — home every other day
> — vacation pay & company health insurance
>
> For more information call
> Bo Schroering 288--1121

Stevens wondered aloud why they were advertising for more drivers when they were reluctant to put Lupo on full-time and suggested that the ad was just a scare tactic. The drivers rehashed among themselves certain standing grievances, such as the failure of the Company to pay detention pay and its continuing failure to raise the mileage payment from 23 cents to 24 cents a mile. The suggestion was made that they should not even attend the forthcoming Company meeting and should simply elect a spokesman to attend on

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[11] Those attending the drivers' meeting were Tomes, Glisson, Longoria, Suddeth, Stevens, Denham, Hogan, and Howard "Pappy" Starcher.

their behalf. They finally decided to attend the Company meeting but elected Longoria to speak at the Company meeting on their behalf.[12]

The Company meeting began at 5 p.m. at the Company terminal. Both Schroerings, their new Vice President for Finance, Joseph Smith,[13] and Mrs. Conrad attended for the Company. All the drivers were present except Lupo, Hogan, and Logsdon. JJ opened the meeting by stating that he knew that some "little green cards"[14] were being circulated but the Company would "address that issue whenever the time comes." He went on to say that the employees at the A.O. Smith plant in Milwaukee were represented by a union and that a "majority of our problems was because of them being in the union." JJ mentioned that he had worked for the Ford Motor Company for about thirty years and had seen where the union at Ford had caused problems with production and slowed the plant down.

JE then addressed the drivers. Among other things, he told them that business was picking up and that the Company would be starting a new run from the A.O. Smith plant in Milwaukee to its plant in Bellevue, Ohio. He mentioned that wages would be increased from 23 cents a mile to 24 cents a mile because of improved gasoline mileage which drivers had been able to achieve, namely, operating vehicles at 6.3 miles per gallon, and he mentioned that if drivers could achieve 6.8 miles per gallon, they would get another penny on their mileage. However, he told them that the implementation of raises would be delayed until the anniversary date of each driver because he felt that seniority was

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[12] It was at the drivers' meeting that Stevens signed a union authorization card. He laid it on the hood of a truck while he was filling it out. Because of his interest in what was being said by other drivers, he forgot to sign his name at the bottom, although he filled in all the other items in his own handwriting.

[13] Smith is an in-law of the Schroerings and an admitted supervisor.

[14] JJ admitted in his testimony that, by "little green cards," he meant Union cards.

one of a drivers' most valuable assets.

Denham brought up the question that drivers were unable to get a full eight hours' rest after driving a ten-hour stint. JE cut him off, saying that they had discussed this matter at earlier meetings and he was not going to discuss it again. His concluding words to Denham were "you know how you have to run." Longoria, who was acting as a spokesman for several drivers, brought up the fact that Tony Lupo wanted to be made a full-time driver. JE replied that making Lupo a full-time driver might cut in on hours available to other drivers but those in attendance indicated that they approved of the move. JE then said he would go ahead with it after consulting with the two drivers who were not at the meeting, told Mrs. Conrad to make a note of it, and promised to notify Lupo the following day. Toward the end of the meeting, Denham brought up the fact that insurance benefits were not being provided for Starcher. JE simply replied that Starcher was uninsurable.

After the formal meeting concluded, Denham, Longoria, Stevens, Tomes, and Glisson met together briefly in the back room. Glisson voiced the opinion that the drivers had not accomplished anything. Outside the terminal building, Stevens asked Denham to turn in his Union card along with the others. Denham made arrangements later with Lupo to deliver the cards to the Union, but the record does not reflect when this was done.

A week later, on May 28, Denham received a phone call from JE, telling him that the Company no longer needed his services and that he would be getting a letter from an attorney giving the reasons. JE did in fact consult with counsel before discharging Denham. Denham went to the Company office to pick up his paycheck. Inside the envelope with the check was the letter which was to be sent to him by the Respondent's attorney, I. Joel Frockt. It read:

This office represents Q-1 Motor Express, Inc., your employer. At this time, Mr. James E. Schroering has come in to review your file with us.

This review reveals that:

1) April 2, 1990 — You were given an oral warning a written record of which is in your file, that your log records were not in order and you were admonished at that time to review your procedures and told that further indiscretions would not be tolerated.

2) May 3, 1990 — Again, your log records were not properly kept, you were told in a written warning that it was your last warning and that further indiscretions would not be tolerated.

3) February 6, 1991 — You were given a written warning for having backed into a fixed object while driving a company leased vehicle and tore the trailer's curtain in half. You were further told that this was a serious matter and that the cost to the Company was in excess of $2,000.

4) January 15, 1991 — You were given an oral warning, a record of which is contained in your file, regarding your drifting off the road surface on I-65 in central Indiana. It was apparent that you were in danger of falling asleep at the wheel or that you had some other problem which affected your ability to control your vehicle in a safe and efficient manner. The Company was aware that you were working outside of Company hours on a farm and advised you were to operate your vehicle in a safe manner. You have also been spoken to on several occasions although not formally warned about coming to work tired and not ready to drive your assignment.

5) March 28, 1991 — A review of your January 1991 logs provided information that you committed nine log violations

in spite of all previous meetings. You were therefore given a three-day suspension and told that the behavior was unacceptable.

6) May 25, 1991 — You were dispatched on a return run from Milwaukee to Corydon, Indiana at 14:30 central daylight time, a trip which takes an average of eight hours. As of 10:30 am this date, you still have not called into the dispatch office. This is nineteen hours from the time you were dispatched.

7) May 25, 1991 — It has come to the attention of the Company that you received a traffic violation in the State of Indiana within the recent past. A review of your log records indicates that this violation has not been logged in violation of Indiana regulation and Company policy.

Because of your poor work record, itemized above, and because of recent violations which have occurred, the Company is left with no choice other than to terminate you at this time. The effective date of your termination is May 25, 1991, upon your return to the Company premises.

The weekend following the Company meeting of May 19 was Memorial Day weekend and no pickups were scheduled in Milwaukee because the A.O. Smith plant was closed. As a result, the truck driven in relay by Stevens and Glisson would be making only four round trips that week. These trips were scheduled from Tuesday through Friday. Glisson and Stevens agreed that Glisson would make the Tuesday and Thursday pickups and that Stevens would have to be ready to drive from Clarksville to Milwaukee sometime Tuesday evening. Mrs. Conrad was informed of their agreement and approved. Stevens told her that he was going to take

a weekend at a lake resort, to which she said: "Have a nice holiday."[15]

Before leaving the office, Stevens went into JE's office to pick up his paycheck. Before giving him the check, JE asked him to sit down and talk. JE began the conversation by telling Stevens that he had talked with the Company's health insurance carrier and said that they would have to pay for fixing Stevens teeth, which needed attention as a result of an injury he had sustained. JE's only comment on that subject was, "I have no argument against that [the payment]. . . . If you hurt yourself, you hurt yourself." He then went on to say to Stevens, "You know, I thought I had better friends in this Company amongst the drivers than what's turned out to be. I know everybody that signed a Union card. If it takes firing everybody to keep the Union out of here, then that's what I'll do. I'm not going to have Local 89 coming in here telling me what I can and can't do with my own company." Stevens replied, "Oh, yeah!" or something to that effect. He picked up his paycheck and left.

On the following Sunday morning, Mrs. Conrad called the home of Stevens' mother in order to get in contact with him. Mrs. Stevens notified her son of the call and he returned the call immediately over the Company's 800 line.[16] Stevens asked Mrs. Conrad what was the matter and she said "Nothing. I thought I was going to need you for a run but don't worry about it. I got it covered." Stevens ended the conversation by saying, "I'll talk to you Tuesday night."

Stevens returned to Clarksville on Monday evening and was home during the following day. He estimated that Glisson would be back to Corydon about 10 p.m. or thereabouts on Tuesday evening so he phoned Mrs. Conrad to inquire. She replied that Glisson had

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[15] Stevens spent the weekend at Rough River Reservoir, about 75 miles south of Louisville.

[16] Mrs. Conrad admits receiving this call. To the extent that her testimony conflicts with that given by Stevens, I discredit her.

not yet arrived in Corydon, whereupon Stevens asked her if she wanted him to call back or whether she would notify him upon Glisson's arrival. Her reply was, "Well Tex [Glisson] didn't make the run. We sent another driver to make the run."[17] Stevens was angry and asked her "What the hell's going on? Why wasn't I offered the run?" Her reply was that it was a "management decision." She refused to tell Stevens whom she put on the run and suggested that he take up the question with JE the following morning.

On Wednesday morning, May 29, Stevens called JE and asked him why the Company sent out another driver when he was available to take the run. JE replied, "We didn't know where you was." Stevens told JE that he had told Mrs. Conrad the previous Friday where he was going to be and also informed him that she had called him on Sunday. Stevens repeated that Mrs. Conrad knew where he was but JE said she had not said anything to him about the call, adding that "we thought you might be in New Orleans."[18] Stevens then said, "Jim, do you think I would go eight hundred miles away from my job without notifying the Company. If I had been going to New Orleans, I would have said so." With this exchange, JE just hung up on Stevens.

On Wednesday evening, May 29, about 10 p.m. or so, when Stevens suspected that Glisson would be back in Corydon from a run to Milwaukee, Stevens called Mrs. Conrad and asked her if he was scheduled to go out. She replied hesitatingly that Glisson had not yet returned and that "you probably won't work this week because they've got some loads off for the end of the week." Stevens replied that, if such were the case, he would start some

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[17] During the ten-day period immediately following the drivers meeting on May 19, the Respondent hired four new drivers---Don Redden on May 21, Bill Torres on May 22, and Brent Mathews and Bob Long on May 28.

[18] On various occasions during his tenure with the Respondent, Stevens has gone to New Orleans to attend to personal business.

long-postponed root canal work. He told Mrs. Conrad he would talk with her the following Sunday or Monday night.

On Sunday night, about 9:30 p.m., he called JE at his home. He complained that he had lost a week's work because of a lack of communication between Mrs. Conrad, JE, and himself and stated emphatically that he did not want it to happen again. He told JE "I'm letting you know right this minute on Sunday night that I am available for dispatch right now." JE replied, "Well, just call me tomorrow. I really don't like to discuss business after hours." He phoned the office the following morning about 10 a.m. and was told that JE had not arrived. He called an hour later and informed JJ, who answered the phone, that he was available for dispatch. JJ replied, "I'm not going to send you back out in the truck until you, me and Leah [Conrad] sit down and discuss what happened last week." He said that he would be busy the rest of the day and suggested that Stevens call him the following morning.

Stevens called the office the following morning to speak with JE. He was told by Smith that both JE and JJ left for Milwaukee. Stevens asked Smith if he was aware that they had scheduled a meeting with him and that he was not to be dispatched until the meeting took place. Smith simply replied that the business trip to Milwaukee came about suddenly and it probably slipped their minds.

The following day, Stevens went personally to the office and spoke with Mrs. Conrad. He asked her whether he was laid off, suspended, or fired. She simply replied that she had no idea because they had not said anything about it. She referred him to Smith. He posed the same question to Smith and Smith replied that he had no idea either. His only instructions were that Stevens was not to be sent back out on the road until a meeting took place involving the Schroerings, Stevens, and Mrs. Conrad.

Upon returning home, Stevens received a termination letter in the mail signed by JE which was dated May 30, nearly a week before. It was written in the form of a memo and read:

Driver: Dan Stevens

Subject: Termination of Employment

This letter is to inform you that your employment at Q-1 Motor Express, Inc., Clarksville, Indiana, is terminated on this date, May 30, 1991.

You have (3) three previous letters in your employee file:

Oral warning	—	Oct. 25, 1990
Written warning	—	Feb. 7, 1991
Suspension	—	April 25, 1991

On 5/16/91, Q-1 Operations Manager Leah Conrad tried to contact you for dispatch reasons. You were unavailable for work. Please note the attached letter to J.E. Schroering from Leah Conrad dated 5/28/91.

The letter from L. Conrad is self explanatory. You were to be available for dispatch and you made yourself unavailable. You had an explanation for your absence, but the excuse has been determined to be invalid. You are effectively terminated as of May 30, 1991.

The letter contained an enclosure which read:

To: J.E. Schroering, President
From: Leah Conrad, Operations Manager
Date: 5/28/91

Please be advised that upon contacting Dan Stevens on 5/26/91 and 5/27/91 that he was unavailable for dispatch on Tuesday 5/28/91. Dan telephoned me on 5/27/91 and stated that he was out of town and would not be available until Tuesday night. As you know, this is not the first time Dan has done this.

Lupo came to work for the Respondent in November 1990. He was variously described as a casual or a regular part-time driver. He drove anywhere from 24 to 72 hours each week and was driving almost as many hours as so-called full-time drivers during the final weeks of his employment with the Respondent. He signed a union card on or about May 10 and was the one whom Denham asked to deliver signed cards to the Union office in Louisville. As noted above, he was the recipient of a warning from Mrs. Conrad to stay away from those who were passing out cards among the Respondent's employees.

Lupo did not attend the Company meeting of drivers on May 19 when his status as a regular full-time driver was discussed. Two days later, he had occasion to discuss his status with Mrs. Conrad. She informed him that he would be receiving a letter from the Company informing him that he would not be made a full-time driver but she advised him to ignore the letter. She told Lupo that JE was mad about the fact that Lupo had called in and made himself unavailable for assignment on or about May 22 and told him that it would all "blow over."

On May 28, Lupo received in the mail a memo from JE dated May 23. It read:

> Mr. Lupo, you have been employed by this company for several months now as a "casual" employee. Our work level has not justified that you be added to the permanent "driver list" but you have been working quite a bit due to driver illness and vacations. The drivers have mentioned that they would like to see you become "permanent", but this will not be the case in the near future.
>
> On Wednesday, May 22, 1991, you called Operations Manager, Leah Conrad, at approximately 05:00 hours and informed her that you were unavailable for dispatch because you had been out all night. You also mentioned that you consumed an amount of alcohol that would make you unavailable for dispatch. This is the

> second time that this has happened since you began working for Q-1 Motor Express, Inc., as a "casual" employee.
>
> We have also experienced some problems with your overall dispatch behavior. Until these behavior inconsistencies are corrected, you will not be considered for full-time status. Operations Manager, Leah Conrad, and myself will re-evaluate your personal situation again in (90) ninety days.

Lupo went to the office the following day and complained to JE about the letter. Lupo objected that he had never said anything to Mrs. Conrad about alcohol or partying when he told her that he would be unavailable for dispatch on May 22. JE replied that Mrs. Conrad had never lied to him but told Lupo to disregard the letter. He assured Lupo that he was still on the driver's board and said that he had written the letter just "to cover my butt."

Lupo continued to be dispatched but noticed that three drivers who had recently been hired were taking more runs than he was receiving. On June 10, he called JE to complain about these assignments. JE's reply was to say that the Respondent was not a Union company, that he ran the boat, and, if he were Lupo, he would not worry about it because Lupo was on his way out. With those words as a concluding salutation, JE slammed down the phone.

Lupo did not work after that date. His last run to Milwaukee had been completed on June 9. On June 12, he and the other two discriminatees in this case filed individual charges with the Board. Lupo delayed turning in the bill of lading on his final run and was contacted by Company officials to do so in order to permit them to bill their customer. He did so on or about June 1 when he came to the office to pick up his paycheck. On June 21, JE sent Lupo a telegram which read:

> We have attempted to reach you daily beginning 6-7-91 through 6-17-91. No response. Again, on 6-18-91,

through 6-21-91 daily attempts were made with no response. Effective this date, 6-21, you are being removed from the casual driver list for absenting yourself during this period. You are hereby requested to return to the Q-1 Motor Express any company equipment in your possession as of this date.

On or about July 18, 1991, the Union wrote to the Respondent to demand recognition. The Respondent did not reply.

In the fall of 1991, after the Consolidated Complaint in this case had been issued and additional drivers had been hired, JE had occasion to speak with Hogan in the parking lot near the office. JE told Hogan that all he wanted was an election and asked Hogan to pass the word that an election was all he really wanted. He went on to suggest to Hogan that the latter would not like working for a union company because unionization would mean "forced dispatch."

C. Analysis and Conclusion

1. The independent violations of Section 8(a)(1) of the Act

(a) When Mrs. Conrad informed JE, in response to information brought to her by her husband, a bargaining unit member, that Union cards were being distributed and that Denham was involved with the distribution, the Respondent engaged in surveillance of the union activities of employees in violation of Section 8(a)(1) of the Act.

(b) When Mrs. Conrad told Lupo in the course of a telephone conversation that management was aware that union cards were being distributed and Lupo should stay away from those who were involved if he knew what was good for him, the Respondent created in the minds of employees the impression that their union activities were the subject of company surveillance and also threatened employees with unstated reprisals for engaging in union activities in violation of Section 8(a)(1) of the Act.

(c) When Mrs. Conrad told Hogan, in the presence of her husband, that she would hate to see her husband join the Union because he would have to find another job, the Respondent was guilty of an implied threat that it would discharge employees in reprisal for union activities in violation of Section 8(a)(1) of the Act.

(d) When JE told Denham that he had talked with Homer Longoria and had learned that Denham was the one who was passing out union cards, the Respondent was guilty of creating in the minds of employees the impression that their union activities were the subject of Company surveillance in violation of Section 8(a)(1) of the Act.

(e) When JE told Denham that the Company would have to fire its drivers, close the Company down, and hire all new drivers, the Respondent engaged in an unlawful threat of reprisal for engaging in union activities in violation of Section 8(a)(1) of the Act.

(f) When JE persisted, telling Denham that no "half-ass union" would come in and tell him how to run his business and that he would close the doors and open under a new name, the Respondent again made an unlawful threat of reprisal for engaging in union activities in violation of Section 8(a)(1) of the Act.

(g) When JE told Denham that he had called Denham's previous employer and learned that Denham had been a member of the Teamsters Union for ten years, JE created the impression that Denham's union activities were the subject of Company surveillance and admitted engaging in an act of illegal surveillance, all in violation of Section 8(a)(1) of the Act.

(h) When JE phoned Mrs. Longoria, stated that all the men were talking about union organization, and asked her what she knew, he was creating in the minds of employees the impression that union activities were the subject of surveillance and was engaging in coercive interrogation concerning union activities. It is true that Mrs. Longoria was not an employee of the Respondent

and did not personally enjoy the protections of the Act. However, the action of the Respondent in this instance was of such a character that it must have known that the contents of the phone conversation with the wife of an employee would soon be communicated to the employee himself, as indeed it was, bringing about, as it did, an immediate and angry reaction. Accordingly, the Respondent, by these actions, violated Section 8(a)(1) of the Act.

(i) When JE told Mrs. Longoria that her husband had gotten himself "in a fix" because of his union activities and went on to suggest that it might take an adverse personnel action against him because of an old accident, he threatened an employee with discharge for engaging in union activities in violation of Section 8(a)(1) of the Act.

(j) When JE told Longoria that he was not going to let the Teamsters come in and destroy everything he and his father had built and that he could turn Q-1 over to a sister company, the Respondent threatened to close the plant in response to union activities in violation of Section 8(a)(1) of the Act.

(k) When JE told Hogan that unionization would bring a policy of forced dispatch into the Company, he was threatening employees with more onerous terms and conditions of employment in reprisal for union activities in violation of Section 8(a)(1) of the Act.

(l) When the Respondent awarded employees a pay raise of one cent per mile to dissuade them from engaging in union activities, it was making an illegal promise of benefit which violated Section 8(a)(1) of the Act. Pressure had been put on the Respondent for several months to grant an increase in the mileage rate from 23 cents to 24 cents a mile, but had been resisted on the claim that gasoline mileage had been insufficient to permit the increase. On May 1, JE sent a memo to drivers thanking them for operating their vehicles with increased fuel economy. He said he would continue to monitor the situation and, if the trend continued, "I will be giving serious consideration to raises in compensation." Three weeks

later, he announced the increase. However, between the May 1 letter and the May 19 announcement, there is nothing in this record to suggest any reason for the granting of the long-promised increase except the onset of union activities. There is no objective data comparing gas mileage on May 1 to gas mileage on May 19 which would support JE's statement at the May 19 drivers meeting that gas mileage had suddenly improved to the point where an increase of one cent per mile was warranted. On the contrary, there is a great deal of evidence in the record of Company animus and illegal activity designed to stifle the unionization of the terminal. This animus, taken together with the timing of the announcement, makes it clear that the modest pay increase was offered for illegal reasons and was therefore a violation of the Act.

(m) The Consolidated Complaint alleges that the Respondent also made an illegal promise of benefit when, at the meeting of May 19, JE agreed to put Lupo on the drivers list as a regular full-time employee, subject only to the approval of two drivers who had not attended the meeting. Lupo had been an employee of the Respondent for several months and had recently been receiving a full share of dispatches, largely because of vacations, illnesses, and other absences by regular drivers. He had been pressing the Respondent for several months to become a full-time driver, since this status would entitle him to health insurance benefits. Each time he made a request he had been rebuffed and given, as a response, the equivalent of "later." At the drivers meeting, however, JE agreed to this request and instructed Mrs. Conrad to make a note of it. He went so far as to promise to notify Lupo of his decision the following day, subject to the qualification noted before. The fact that JE reneged on this promise within a matter of days does not detract from the fact that he made it. It also illustrates a willingness to adjust a grievance in response to an employee complaint, even though his advertised willingness was insincere. By promising to install Lupo to permanent driver status at a time when the Respondent was making both threats and promises aimed at heading off the unionization of the Company and, by doing so for antiunion reasons, the Respondent herein violated Section 8(a)(1) of the Act.

(n) Late in May during a conversation that took place in his office, JE told Stevens that he knew the identities of everyone who had signed a union card. This statement constitutes another instance of creating in the minds of employees the impression that their union activities were the subject of company surveillance and is a violation of Section 8(a)(1) of the Act.

(o) JE's statement to Stevens on the same occasion that he would be willing to fire all of his employees if that is what it took to keep the Union out of the Company is an illegal threat of repisal which violates Section 8(a)(1) of the Act.

(p) JE told Lupo on June 10 during the course of a phone call that the Company was not a union company and if he were Lupo, he would not worry about missing out on dispatches since Lupo was on the way out is a threat to discharge an employee for union activities which violates Section 8(a)(1) of the Act.

(q) JE's statement to Hogan in the fall of 1991 that the unionization of the plant would bring about forced dispatches is a threat to impose upon employees more onerous working conditions in repisal for union activities and is a violation of Section 8(a)(1) of the Act.

2. The discharges of Denham, Stevens, and Lupo

The discharges of Denham, Stevens, and Lupo, all of which took place within three weeks of each other, were accomplished by an employer who, by its statement, had never before discharged anyone and who had sought legal advice before doing so. The discharges were accomplished against a background of intense antiunion animus, just shortly after the onset of an organizing drive, by an employer who had repeatedly threatened to fire all of its drivers if that is what it took to defeat the organization of its Company. These discharges also contain other common threads. All three discharges were justified by a string of stale complaints about the job performances of the affected drivers. They were evidenced by a series of written reprimands which none of the

drivers had ever seen before they were confronted with them, months later, in the course of a U.S. District Court hearing in Indianapolis in October 1991.[19] In all three instances the discharged employees had signed union cards before being discharged and had been the subjects of 8(a)(1) statements by the Respondent's supervisors which were directed personally and individually at them. In the case of Denham, the discharge served to remove from the Respondent's payroll the leader of the organizing drive and a person whose leadership was well known to the Respondent. These common threads give rise to more than a mere suggestion that they were accomplished for discriminatory reasons.

I credit the testimony of Denham, Stevens, and Lupo that none of them had access to their respective personnel records and that none of them had actually received the written warnings relating to a score of misdeeds upon which the Respondent relies to justify their respective discharges. Laying a paper trail to prepare a legal defense for an illegal action is hardly an unprecedented act on the part of an employer who is bent on defeating an organizing drive. *See, for example, Chopp & Co.*, 299 NLRB No. 120 (July 31, 1989); *Louisiana-Pacific Corp.*, 299 NLRB 5 (July 13, 1990). The fact that JE sought legal advice before taking a routine step of discharging an erring employee suggests that he was plotting his course carefully from the outset. Moreover, the reliance upon stale complaints—misconduct which was tolerated when it happened but which later became intolerable when unionization was taking place--is a solid indication that the discharge is being accomplished for a discriminatory motive[20] because it is motivation, not justification, that determines whether or not a discharge violates Section 8(a)(3) of the Act. *Family Foods*, 300 NLRB No. 72 (Oct. 31, 1990).

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[19] Application for temporary injunction under Sec. 10(j) of the Act. *Bordone v. W-1 Motor Express, Inc.*, NA, 91-141-C, U.S. District Court for the Southern District of Indiana, New Albany Division.

[20] *See Goren Printing Co.*, 284 NLRB 30 (1987), and cases cited therein at page 34.

In the case of Denham, he was furnished with a seven-item bill of particulars justifying his discharge by the Respondent's attorney within a week after he solicited sufficient cards to provide the Union with majority status in the Respondent's bargaining unit. The letter was sent within days of Denham's action in speaking up at the drivers' meeting of May 19 to complain about certain Company practices. Two of the items in the bill of particulars related to events which were more than a year old and pertained to improper driver's logs. The Respondent knew and indeed engendered the standard practice among its drivers of keeping false and improper logs to cover up their on-going practice of violating DOT driver safety regulations. Relying upon such complaints to explain or justify a discharge is little short of hypocrisy. The February 6, 1991 item in the attorney's letter relating to a torn trailer curtain recites false information. The curtain in question was repaired by Denham and Suddeth and the tear cost the Company nothing. Moreover, curtain tears on Company trailers are commonplace in the Respondent's operation. Torn curtains are routinely repaired and retained in service, as was the case with the torn curtain on Denham's truck. With regard to drifting off the road surface on I-65 in central Indiana on February 15, this is another example of a stale complaint. There is no proof, other than the Respondent's unworthy testimony, that any written record of an oral warning for this infraction was ever placed in Denham's file nor is there any credible evidence in the record to rebut Denham's testimony that he was not working outside Company hours on a farm, as alleged in the discharge letter. As for the allegation, also set forth in the letter, that Denham was repeatedly warned for coming to work tired, to the extent this was so his fatigue was occasioned by the excessive number of hours, without required breaks, which he was required to drive in order to meet the Respondent's tight delivery schedule. The Respondent was well aware of this problem from several complaints which Denham had made, including one which he had recently voiced at the May 19 meeting, only to be put down by JE for even mentioning the topic.

Item five in the attorney's letter, a March 28, 1991, is a log violation for which Denham was given a suspension. This is

another example of a complaint for activity which was routinely condoned and encouraged by the Respondent and hardly the basis for any discipline which might be administered evenhandedly. The suspension mentioned in the letter took place over a three-day Easter holiday weekend when Denham and all the Respondent's other drivers were not scheduled to work, so any loss of pay which a suspension would normally bring about was never reflected in Denham's paycheck. Denham testified credibly that he never knew of the suspension until confronted on the stand at the U.S. District Court hearing in October concerning the March discipline. The whole complaint was contrived and without merit, either as a basis or a motivating cause for discharge and is a further indication of the pretextual nature of the discharge.

Item seven—Denham's failure to log a traffic violation in his report—falls within the same category as other log violations. In March, Denham promptly reported a traffic citation to the Respondent and was able to have it dismissed. The gravamen in this so-called disciplinary action was not that he failed to notify the Company of a traffic citation but that he failed to write it in his log as well. To rely on a trivial matter occurring in late March to justify a discharge in late May is another instance of a stale complaint justification as well as disparate treatment of Denham *vis-a-vis* other drivers who routinely engaged in falsification of logs.

Item six—which apparently is the precipitating event which assertedly triggered Denham's discharge—recites that, on May 25, upon a return run to Corydon, Indiana, from Milwaukee, Denham was on the road for nineteen hours without calling the dispatcher at stated intervals, as required by Company practice. Denham testified that, during this run, he called in to the dispatcher at repeated intervals throughout the trip. I credit his testimony.

In light of the factors outlined above—company animus, threats of discharge and animus directed particularly to Denham, suspicious timing, Denham's conspicuous leadership in the union drive, and the flimsy, sometimes false, and thoroughly pretextual nature of the Respondent's proffered explanation—I conclude that

the Respondent discharged Donald Ray Denham because of his membership in and activities on behalf of the Union and, in so doing, violated Section 8(a)(1) and (3) of the Act.

The discharge of Dan W. Stevens followed hard on the heels of Denham's termination. Stevens began working for the Respondent in August 1990 and, in the course of his employment, drove an estimated 80 or 85 round trips to Milwaukee from southern Indiana. His last day of work was May 30, 1991.

Stevens signed a card on May 19 at the meeting which the drivers held just before the Company meeting. The following weekend, he had a conversation with JE during which JE told Stevens that he knew the identities of everyone who had signed a card and expressed an opinion to Stevens that the drivers had betrayed him, complaining that he thought he had better friends than he did. There can be little doubt that JE was referring to Stevens when he made this remark.

What followed after this conversation was a runaround that led to the sending of a letter, dated May 30, which recited three previous disciplinary actions and stated that Stevens' excuse for making himself unavailable for dispatch on May 28 was invalid. In fact, Stevens was available for dispatch on that date and planned on taking a return trip to Milwaukee as soon as his slip-seat partner, Glisson, returned to Clarksville. In fact, on the evening of May 28, he was waiting for a call from the dispatcher and, when it did not come as expected, called Mrs. Conrad to learn that someone else had been sent out in his place. His response to this information was, "What in the hell is going on?"

Three previous disciplinary actions noted in Stevens' memo of termination were either stale complaints or false recitations of the events which gave rise to characterizations of wrongdoing on his part. Stevens was involved in an accident of minor consequence on October 25, 1990, and, at the suggestion of JE, falsified some of the facts relating to the collision so that the Company's insurance company would not learn that Stevens had backed into a parked

truck. JE told Stevens during the investigation of the accident that, if he made the insurance company aware of his action, the Company would have to fire him. For his complicity with JE in this scam a reprimand appeared in Stevens' personnel file when the Respondent was attempting to building a case against him to justify his discharge.

The second reprimand, dated February 7, involved a blowout along the road which resulted in damage to the rim on one of the Respondent's trailers. The document accused Stevens of lying when he reported the blowout and exercising poor judgment in bringing the truck into the terminal for repair rather than calling first to find out whether he should bring it in. This stale complaint, like the October 25 reprimand, had been placed in Stevens file without his knowledge. Like Denham, he had no knowledge of these reprimands until confronted with them in October at the U.S. District Court hearing in Indianapolis in the 10(j) case.

The third reprimand recited a suspension on April 25 because of a false report concerning an accident suffered by Stevens during the loading of his truck in the A.O. Smith yard in Milwaukee. At the time Stevens received the suspension, he was on workmen's compensation and would not have been employed in any event. Accordingly, he lost no pay that he would otherwise have earned. This suspension, like the other reprimands, first came to Stevens' attention at the 10(j) hearing months later.

Stale complaints, coupled with a fanciful version of the events assertedly bringing about Stevens' discharge, do not rebut the strong *prima facie* case which the General Counsel established. Accordingly, I conclude that the Respondent discharged Dan W. Stevens because of his membership in and activities on behalf of the Union and, in so doing, violated Section 8(a)(1) and (3) of the Act.

Lupo was employed by the Respondent in November 1990. He signed a Union card on or about May 10. He was discharged (removed from the casual driver list) on or about June 19, seven days after filing one of the unfair labor practice charges in this case.

The asserted reason for the discharge was his failure to make himself available for dispatch, although the Respondent presumably had no policy of forced dispatch and even featured that policy, in conversations with drivers, as a reason for avoiding unionization. The Respondent's response to Lupo's long-sought desire to become a regular full-time driver was, at best, ambivalent. Before the organizing drive arose, JE told Lupo that it would be a while before he would be considered for permanent status. After the drive arose, JE acceded to a driver request that Lupo be hired on a full-time basis, subject only to the concurrence of two employees who were missing from the Company meeting. JE even said that he would notify Lupo of this decision the following day. Within days, JE wrote Lupo, saying that Lupo would not be considered immediately for permanent status because, among other things, there were insufficient runs justifying the employment of another full-time driver. At the same time, the Respondent was hiring four new employees. The other proffered reason for denying Lupo permanent status was that he had failed to make himself available for dispatch on May 22. Not only was this reason contrary to the Company's announced policy against forced dispatches but the facts stated in the reprimand, namely, that Lupo had been drinking, were also false.

Throughout the month of June, following his last dispatch on June 7, Lupo continued to make himself available for dispatch. On or about June 10 he phoned JE and asked why new employees were being assigned to runs in preference to himself and was given a curt reply relating to union activities and to Lupo's dubious future with the Company. This reply clearly suggested that JE was aware that Lupo was among the majority of employees who had signed union cards. Lupo visited the Company office on or about June 14 to pick up his paycheck and was not informed, either then or on any other occasion, of any dispatch to which he had been assigned, notwithstanding the Company's repeated assertion that it had been attempting to contact him for two weeks without success.

The reasons advanced for the discharge of Lupo, a known union adherent, were flimsy and pretextual and without foundation

in fact. They fall far short of any reliable explanation which would rebut the strong *prima facie* case of discrimination which the General Counsel established. Accordingly, I conclude that Anthony Lupo was discharged because of his membership in and activities on behalf of the Union and that the discharge violated Section 8(a)(1) and (3) of the Act.

3. The Respondent's refusal to bargain

The parties have agreed to a generic description of an appropriate bargaining unit. It should include all full-time and regular part-time truck drivers and driver-mechanics employed at the Clarksville terminal. They disagree, in some respects, as to who should be included in that unit. They agree that Glisson, Conrad, Logan, Logsdon, Stevens, Longoria, Tomes, Lupo, and Starcher should be in the unit, as of that date. The General Counsel also contends that Denham and Suddeth should be included, thereby establishing a bargaining unit of eleven members. There is no reason why Denham, who was then a full-time driver on the Respondent's payroll, should not be included and I do so. As for Suddeth, he was not only a mechanic but also drove for the Respondent on occasions when driver shortages arose. He was always on call and regularly employed. His status clearly fits the unit description of a regular driver mechanic. Accordingly, I include his name among those eligible to vote on May 19.

Six of these individuals signed union cards which were admitted into evidence on or before May 19. Their designation of the Union would give the Union majority status as of that date. Denham said as much at the informal drivers' meeting which took place before the Company meeting on May 19. Respondent objects to any determination of majority based upon Longoria's card because it was not produced at the hearing for inspection Longoria credibly testified that he signed a Union card before the May 19 meeting. Apparently his card was mislaid. It is well settled that secondary evidence is admissible to authenticate the signing of a card and I would do so in this instance, thereby counting Longoria's designation of the Union in determining its status as of May 19.

Aero Corp., 149 NLRB 1283, 1291 (1964, (Monroe Lindsey); *J.P. Stevens & Co.*, 247 NLRB 420 at 486 (1980) (Fred Houston); *Hedstrom Co.*, 223 NLRB 1409, 1411 (1976) (William Hammer); *Gupta Permold Corp.*, 289 NLRB 1234, 1258 (Brian Moree). The Respondent also objects to the use of Stevens' card because, while Stevens filled out the body of the card, he neglected to affix his signature in cursive script at the bottom. Such a trivial oversight does not invalidate a card. *Pilgrim Life Insurance Co.*, 249 NLRB 1228 at 1241 (1980) (Debra Marie Marinaro); *Laidlaw Waste Systems*, 305 NLRB No. 5 (Sept. 30, 1991) (Delbert Baldwin). Thus, it is clear that, as of May 19, 1991, the Union had been designated the collective-bargaining representative by 8 out of the 11 individuals employed by the Respondent in its driver-mechanic bargaining unit.

The Respondent points out that the Union did not make a demand for recognition until July 18 and contends that majority status should be determined as of that date, not as of May 19. If this were so, the cards of Denham, Stevens, and Lupo would still have to be counted since they are discriminatees and cannot be deprived of their right to designate a bargaining agent by the Respondent's unlawful conduct. *John Kinkel & Son*, 157 NLRB 744 (1966); *Brunswick Meat Packers*, 164 NLRB 887 (1967); *Wisconsin Bearing Co.*, 193 NLRB 249 (1971); *Custom Bent Glass Co.*, 304 NLRB No. 46 (Aug. 27, 1991). As of July 18, the date of the demand, there were four additional drivers on the Respondent's payroll. These are the individuals who were hired in late May, presumably in response to the ad which was placed in the Louisville *Courier-Journal*. Using July 18 as the date for determining majority status would mean that the Union still had eight cards in a unit of 15 rather than 11 employees and would not be deprived of a majority status.

However, May 19, not the later date, is the appropriate date to use for this purpose. It is well settled that a so-call *Gissel*[21] order is a remedy for an 8(a)(1) violation, not an 8(a)(5) violation.

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[21] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Hence, where, as here, an employer embarks upon a campaign of illegal activities designed to undermine the union's majority status, a union will be deemed to have achieved that status if it has done so at any time after the unlawful campaign has begun. Indeed, there is no legal requirement that a union, in such circumstances, even make a demand for recognition in order to be entitled to the benefit of a bargaining order. In this case, the Respondent began to undermine the Union's status as soon as it learned that its employees were organizing, an event which occurred several days before the May 19 date here in issue. *Lapeer Foundry & Machine,* 289 NLRB 952 (1988); *M.K. Morse Co.,* 302 NLRB No. 147 (May 14, 1991); *Laidlaw Waste Systems, supra.* In light of these considerations, I conclude that, by failing and refusing to bargain with the Union as the exclusive majority representative of its employees in the unit noted above, the Respondent violated Section 8(a)(1) and (5) of the Act.

Upon the foregoing findings of fact and pursuant to Section 10(c) of the Act, and upon the entire record herein considered as a whole, I make the following:

II. Conclusions of Law

1. Q-1 Motor Express, Inc. is now and at all material times herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. General Drivers, Warehousemen & Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL--CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time truck drivers and driver-mechanics employed by the Respondent at its Clarksville, Indiana terminal, exclusive of office clerical employees and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about May 19, 1991, the Union herein has been the exclusive collective-bargaining representative of all the employees in the unit found appropriate in Conclusion of Law 3 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of its employees employed in the unit found appropriate in Conclusion of Law 3, the Respondent has violated Section 8(a)(5) of the Act.

6. By discharging Donald Ray Denham, Dan W. Stevens, and Anthony Lupo because of their membership in and activities on behalf of the Union, the Respondent herein violated Section 8(a)(3) of the Act.

7. By the acts and conduct set forth above in Conclusions of Law 5 and 6; by coercively interrogating employees concerning their union activities and the activities of other employees; by creating in the minds of employees the impression that their union activities are the subject of company surveillance; by threatening to discharge employees and to close the Company in order to discourage union activities; by promising and paying increased wages to employees in order to discourage union activities; by threatening to impose upon employees more onerous working conditions if they engaged in union activities; by promising to adjust grievances in order to discourage union activities; and by threatening to take unspecified reprisals upon employees if they unionized, the Respondent violated Section 8(a)(1) of the Act.

8. The unfair labor practices recited above have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

III. Remedy

Having found that the Respondent herein has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Since the independent violations of Section 8(a)(1) of the Act found herein are repeated and pervasive and evidence an attitude on the part of the Respondent to behave in total disregard of its statutory obligations, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods,* 242 NLRB 1357 (1979). The recommended Order will also recommend that the Respondent be required to offer to Donald Ray Denham, Dan W. Stevens, and Anthony Lupo full and immediate reinstatement to their former or substantially equivalent employment and to make them whole for any loss of earnings which they may have sustained by reason of the discriminations practiced against them, in accordance with the *Woolworth* formula,[22] with interest at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of federal income taxes. *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

The General Counsel has requested a so-called *Gissel* remedy which would require the Respondent to recognize and bargain with the Union as the exclusive bargaining representative of its production and maintenance employees. In this case, the Respondent engaged in a campaign of wholesale intimidation of its employees. It included the discharge of the in-house leader of the campaign and two other card signers. The Respondent threatened to close the plant and gave evidence of the seriousness of its announced intention when it carried out a companion threat to discharge union adherents. The eleven-man unit in which this activity took place interacted with each other and with the Respondent's management on a highly personal basis, so it is hard to

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[22] *F.W. Woolworth Co.*, 90 NLRB 289 (1950).

imagine that an election could be conducted in an atmosphere free of coercion and intimidation when the owners and managers behaved without compunction in the manner in which they did. The Board and the Seventh Circuit have approved bargaining orders in other cases where illegal conduct was far more restrained than that which was recited in the record in this case. *NLRB v. Henry Colder Co.*, 447 F.2d 629 (1971); *NLRB v. Copps Corp.*, 458 F.2d 1227 (1972); *NLRB v. Big Ben Shoe Store*, 440 F.2d 347 (1971); *NLRB v. Brown Specialty Co.*, 436 F.2d 372 (1971); *NLRB v. Texaco, Inc.*, 436 F.2d 520 (1971), *cert. denied* 409 U.S. 1008; *NLRB v. Self-Reliance Ukranian American Cooperative*, 461 F.2d 33 (1972); *Townhouse TV & Appliance v. NLRB*, 531 F.2d 826 (1976); *Walgreen Co. v. NLRB*, 509 F.2d 1014 (1975); *NLRB v. Berger Transfer & Storage*, 678 F.2d 679 (1982). I will also recommend that the Respondent be required to expunge the personnel records of the three discriminatees of any and all reprimands and other disciplinary action taken in pursuit of its illegal purposes and that it be required to post the usual notices advising its employees of their rights and of the results in this case.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record herein, I make the following:[23]

ORDER

The Respondent, Q-1 Motor Express, Inc., and its officers, agents, supervisors, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities and the union activities of other employees.

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[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Creating in the minds of its employees the impression that their union activities are the subject of Company surveillance.

(c) Threatening to discharge employees or to close the plant in reprisal for engaging in union activities.

(d) Granting pay increases and promising to adjust grievances in order to discourage union activities.

(e) Threatening employees with more onerous working conditions and other unspecified reprisals for engaging in union activities.

(f) Discouraging membership in or activities on behalf of General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL– CIO, or any other labor organization, by discharging employees or otherwise discriminating against them in their hire or tenure.

(g) Refusing to recognize and bargain collectively with General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of all the Respondent's full-time and regular part-time drivers and driver-mechanics employed at its Clarksville, Indiana terminal, exclusive of office clerical employees and supervisors as defined in the Act.

(h) By any other means or in any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. The following affirmative action designed to effectuate the purposes and policies of the Act.

(a) Offer to Donald Ray Denham, Dan W. Stevens, and Anthony Lupo full and immediate reinstatement to their former or

substantially equivalent employment, without prejudice to their seniority or to other rights previously enjoyed, and make them whole for any loss of pay or benefits suffered by them by reason of the discrimination found herein, in the manner described above in the remedy section.

(b) Expunge from the personnel records of Donald Ray Denham, Dan W. Stevens, and Anthony Lupo any and all disciplinary warnings and discharge notices, and notify them in writing that such warnings and notices will not form the basis for future disciplinary actions.

(c) Recognize and, upon request, bargain collectively in good faith with General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL--CIO, as the exclusive collective-bargaining representative of all full-time and regular part-time drivers and driver-mechanics employed by the Respondent at its Clarksville, Indiana terminal, exclusive of office clerical employees and supervisors as defined in the Act.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at the Respondent's Clarksville, Indiana terminal copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon

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[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. March 11, 1991

/s/ Walter H. Maloney
Walter H. Maloney
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

Q-1 MOTOR EXPRESS, INC. IS POSTING THIS NOTICE TO COMPLY WITH AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD WHICH WAS ISSUED AFTER A HEARING IN A CASE IN WHICH WE WERE FOUND TO HAVE VIOLATED CERTAIN PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT.

WE WILL NOT coercively interrogate our employees concerning their union activities and the union activities of other employees.

WE WILL NOT create in the minds of our employees the impression that their union activities are the subject of Company surveillance.

WE WILL NOT grant pay increases and promise to adjust grievances in order to discourage union activities.

WE WILL NOT threaten to discharge employees or to close the terminal in order to discourage union activities.

WE WILL NOT threaten employees with more onerous working conditions and other specified reprisals for engaging in union activities.

WE WILL NOT discharge employees or otherwise discriminate against them in their hire or tenure in order to discourage their support for General Drivers, Warehousemen & Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL-CIO, or any other labor organization.

WE WILL NOT, by any other means or in any manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act. These rights include the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid and protection.

WE WILL, on request, bargain collectively in good faith with General Drivers, Warehousemen & Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of all of the full-time and regular part-time drivers and driver mechanics employed at our Clarksville, Indiana terminal, exclusive of office clerical employees and supervisors as defined in the Act.

WE WILL offer full and immediate reinstatement to Donald Ray Denham, Dan W. Stevens, and Anthony Lupo to their former or substantially equivalent employment, and WE WILL make them whole for any loss of pay which they have suffered by reason of the discriminations practiced against them, with interest.

WE WILL remove from our files any references to the unlawful discharges and disciplinary actions taken against Donald Ray Denham, Dan W. Stevens, and Anthony Lupo, and WE WILL notify them in writing that this has been done.

Q-1 MOTOR EXPRESS, INC.

_____

(Employer)

Dated _____ By_____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street, Room 3003, Cincinnati, Ohio 45202-3271, Telephone 513-684-3663.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

SAUNDRIA BORDONE, Acting Regional Director of Region 9 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	
vs.	)	NA 91-141-C
Q-1 MOTOR EXPRESS, INC.,	)	
Respondent.	)	

ENTRY

Saundria Bordone filed a petition on behalf of the National Labor Relations Board for temporary injunction under Section 10(j) of the National Labor Relations Act. This court conducted a hearing on that petition, during which the petitioner filed a Memorandum of Points and Authorities. After the hearing, Q-1 Motor Express filed an amended answer (with affirmative defenses) and response brief addressing the issues raised in the petition and the evidence presented during the hearing. The petitioner, however, failed to file a post-hearing brief addressing either the evidence presented or the response brief filed by the respondent.[1] Based on the parties' filings and the evidence presented during the hearing, this court DENIES the petition for injunctive relief.

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[1] The petitioner filed a three page post-hearing memorandum regarding the admissibility of two union authorization cards.

I. Background

Three former employees of Q-1 Motor Express (Donald Ray Denham, Dan W. Stevens, and Anthony Lupo) and Local Union No. 89 (a union affiliated with the International Brotherhood of Teamsters) filed charges with the National Labor Relations Board alleging that Q-1 Motor Express violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act. Five months later, with a N.L.R.B. hearing approximately one and one-half months away, the petitioner filed a petition in this court for injunctive relief "pending the final disposition of the administrative matters involved herein now pending before the Board."[2]

Petitioner requested an injunction claiming she has "shown that the interim relief she is seeking is 'just and proper' and that there is a substantial likelihood that the Board and Court of Appeals for the Seventh Circuit will find that respondent engaged in the [claimed] unfair labor practices." The petitioner claimed that any harm to Q-1 Motor Express flowing from a temporary injunction will be outweighed by the "public interest in the effective enforcement of the Act." The petitioner claimed that an injunction is "essential, appropriate and just and proper . . . [to] avoid[] substantial, irreparable and immediate injury to [the Act's] polices, to respondent's employees, the union and to the public interest."

This court heard testimony for three days on the petition; the hearing concluded on October 21, 1991, and the petitioner was allowed until October 30, 1991, to file a final reply. Having considered the pre-trial briefs, the evidence presented,[3] and the post-trial submissions, this court states its findings of fact and conclusions of law.

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[2] Petitioner requested this court enjoin Q-1 Motor Express from engaging in further unfair labor practices and order Q-1 Motor Express to offer Denham, Lupo, and Stevens immediate and full reinstatement, purge from Denham's, Lupo's, and Stevens' files any pretextually created documents, bargain on an interim basis with Local Union No. 89, and conspicuously post a copy of this court's order at Q-1 Motor Express' place of employment.

[3] A transcript of the hearing was completed on December 2, 1991.

II. Findings of Fact

1. Q-1 Motor Express, a trucking company engaged in interstate commerce (Indiana, Wisconsin, Illinois, and Ohio), is incorporated in Indiana and its principle place of business is in the Southern District of Indiana.

2. James E. Schroering ("J. Schroering") is the president and general manager of Q-1 Motor Express.

3. In mid-May 1991, Denham, then a truck driver for Q-1 Motor Express, met with Jerry Shaw, a Local Union No. 89 representative, and discussed starting a union drive at Q-1 Motor Express. Shaw gave Denham approximately 20 blank union authorization cards. Denham distributed these union cards to Q-1 Motor Express' employees--either personally or though fellow drivers.

4. Denham testified that on May 17, 1991, J. Schroering asked him if he was passing out union cards. Denham testified that when he said "yes," J. Schroering "went on to tell me that he was not going to have no union representative come in, tell him how to run his business, and that he had talked to his attorney, and that he could close his business [and get rid of all the drivers] and open up under a new name within seventy-two hours with different bingo stickers," Hearing Transcript, p. I-31, and "that he would close the doors and open up under a new name." Hearing Testimony, p. I-36.

5. J. Schroering, however, testified that when he talked briefly with Denham on May 17, 1991, he approached and wanted to talk to Denham only about whether his family problems (with his ex-wife) were affecting his work. Hearing Transcript, p. II-215; p. II-216; p. II-218. J. Schroering testified that, "The dispatcher [Leah Conrad] had been complaining about [Denham's] behavior: He had stopped doing things he was supposed to do, he was doing things his own way; he was slurring people in his overt behavior . . . That's why I asked him, 'Donnie, what's the problem?'" Hearing Testimony, p. II-216.

6. J. Schroering claimed he did not ask Denham about distributing union cards, but Denham "may have said something about the union, at which point I just wanted him to get the truck [back on the road]." Hearing Testimony, p. II-216.

7. J. Schroering testified that it was a short conversation because Denham was "in a bad mood to begin with" and was "very belligerent." Hearing Testimony, p. II-215.

8. Lupo testified that on May 17, 1991, while he was placing a radio in either his or Denham's truck, he heard J. Schroering tell Denham that "if we proceeded with the union activities he would close the doors down." Hearing Transcript, p. II-14.

9. J. Schroering testified that Lupo was "probably a hundred feet away" and could not have heard his and Denham's conversation. Hearing Testimony, p. II-214.

10. Lupo testified that on May 17, 1991, Leah Conrad, a Q-1 Motor Express dispatcher, told him that Q-1 Motor Express knew union cards were being passed out and that Lupo should "stay away from certain people at that time." Hearing Transcript, p. II-34.

11. Leah Conrad, however, testified that "I can absolutely swear under oath to this court that I never had any discussion with Tony Lupo about the union, period. Never, at any time." Hearing Transcript, p. III-167.

12. Further, Leah Conrad also testified that, "I purposely refrained from talking to any driver during the point in time that I knew there were union activities, because of the fact that I realized that it was--that you were not supposed to do that." Hearing Testimony, p. III-179.

13. Two meetings took place on May 19, 1991, a drivers meeting at a truckstop in Hamburg, Indiana, and a subsequent Q-1 Motor Express meeting on Old Potters Lane. Denham testified that at the driver's meeting, he told the seven drivers in

attendance that "we elected [Local Union No. 89] to be our bargaining representatives, and that . . . we did not have to go to the [Q-1 Motor Express] meeting." Hearing Testimony, p. I-38.

14. Denham attended the meeting anyway, and he testified that at the Q-1 Motor Express meeting, J.J. Schroering, J. Schroering's father, told the Q-1 Motor Express drivers that he knew about the union cards. Hearing Testimony, p. 39. Denham testified that J.J. Schroering then told the drivers that based on recent improvements in fuel economy, he anticipated giving the drivers a pay raise. Denham testified that J.J. Schroering also said he would consider to extend insurance to one driver, promote Lupo from a temporary to a full-time position, and pay drivers for "detention time."[4] Hearing Testimony, p. II-192. Denham also testified that Q-1 Motor Express announced that it had placed a newspaper want-ad because it was expanding operations and needed to hire additional drivers.

15. J. Schroering testified that the May 19, 1991, Q-1 Motor Express meeting was similar to past company meetings: Q-1 Motor Express first explains to the employees any important developments or changes, and then opens the floor to the employees to discuss current problems, suggestions, or grievances.

16. J. Schroering testified that at the May 19, 1991, meeting, he told the drivers that because of the favorable fuel economy, he was raising the drivers' pay by one cent per mile.[5] J. Schroering testified that this raise had been discussed before, which was corroborated by various witness for the petitioner who conceded that a raise was in the works before the union drive

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[4] Denham testified that "detention time is, anything after two hours from the time you get to A.O. Smith in Milwaukee, we was to be paid detention time, for every hour that we sit there." Hearing Testimony, p. I-19.

[5] Q-1 Motor Express introduced a May 1, 1991, (pre-union campaign) letter in support of its contention that Q-1 Motor Express planned to give their drivers a pay raise based on fuel economy.

started.[6]

17. J. Schroering testified that after discussing the pay raise, Q-1 Motor Express opened discussions to address driver complaints, including various problems such as detention time and a possible change of Lupo's status from part-time to full-time.

18. Although the union cards were signed by May 19, 1991, Denham testified (in response to a question about whether he and J. Schroering discussed a union vote on May 19, 1991) only that "[J. Schroering] said he knew that union cards were being passed out." Transcript of hearing, p. I-36. Denham did not testify that he or another driver or the union discussed with J. Schroering the union campaign or presented J. Schroering with a card majority or demanded recognition based on a card majority at the May 19, 1991, Q-1 Motor Express meeting.

19. Stevens testified that on May 24, 1991, J. Schroering called him into his office and told him that he knew who had signed union cards and that he was going to fire everyone who was involved in the union campaign. Hearing Transcript, p. II-73.

20. J. Schroering testified that he had not threatened Stevens or done anything to give Stevens an impression the pro-union drivers were under surveillance. Hearing Transcript, p. III-74.

21. J. Schroering testified that there were rumors of union activity in mid-May (he noted that "I've heard rumors at different times since we have been in business"), but that he "didn't find out [who signed union cards] until the first Wednesday we were here. The names started coming out from the proceedings." Hearing Testimony, p. III-11.

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[6] For example, Stevens testified that, "Well, it was all the things that had been discussed many, many times previously: a pay raise on our mileage rate, detention time, having to wait in Milwaukee for long periods of time, about the logs, about us taking our eight-hour legal break." Hearing Testimony, p. II-65.

22. J. Schroering testified that, "after the initial shock of somebody telling you what's going on, you know, I did some reading; I found out that it was their rights, and there was nothing I can do about it, basically it was something that I could not control. At that point I just--I guess I was relegated to the fact that a vote was probably forthcoming, and whatever they voted, I would do . . . . From the first time [I heard that union activity was afoot] I talked to Joel Frockt, my attorney in Louisville, I was informed of some things you just cannot do. And I behaved, more or less." Hearing Testimony, p. II-222.

23. J. Schroering, while in college, had been a member of Local Union No. 89.

24. J. Schroering testified that when Leah Conrad told him that there were rumors of a union drive, he told Leah Conrad, "I've heard that stuff before. You just go ahead and do your job the way you're supposed to do your job." Hearing Testimony, p. III-104.

25. After the May 19, 1991, meetings, but before Local Union No. 89's July 18, 1991, demand for recognition, Q-1 Motor Express fired Denham, Lupo, and Stevens. The petitioner claimed that Q-1 Motor Express terminated the employment of Denham, Stevens, and Lupo based on their union activities.

26. Q-1 Motor Express' written disciplinary policy is a progressive, four-step process. *See Respondent's Exhibit D.* For a first offense, a driver is given an oral warning. For the second offense, a driver is given a written warning. The written warning is customarily transmitted with the driver's pay stub; a copy of the written warning is also recorded by Q-1 Motor Express in the driver's personnel file. For a third offense, a driver is subject to a three-day suspension. A fourth offense is grounds for immediate termination. In addition, a driver may be terminated immediately under the policy for serious infractions, such as "dishonesty" or causing a "Major Chargeable Accident."

27. Q-1 Motor Express' drivers are governed by the Department of Transportation (DOT) regulations, regulations that

require over-the-road truck drivers to record the number of hours and miles driven on each trip. The DOT also requires drivers to log all of their stops, rest periods, and traffic violation tickets in the DOT logbook. If a driver is stopped at a weigh station and his DOT logs are not properly filled out, the driver may be "cited" and immediately "shut down . . . take him out of service." Hearing Testimony, p. III-10.

28. The DOT conducts periodic audits of trucking company logbooks. When the DOT checks logbooks, J. Schroering testified "[the DOT] expect[s] to find everything in order. There is no leeway." Hearing Testimony, p. II-96. He testified that the DOT audited Q-1 Motor Express once and rated it the highest possible rating, "satisfactory." Hearing Testimony, p. II-194. When the DOT audit report is satisfactory, J. Schroering testified, the DOT "stays away for a while. And that's one of the benefits of running a clean shop." Hearing Testimony, p. III-103.

29. J. Schroering testified that he therefore requires Q-1 Motor Express drivers to fill-out and turn-in DOT logs every five days, and issues warnings and under some circumstances terminates a driver's employment–in accord with its written disciplinary policy, *see Respondent's Exhibit D*–for violating DOT regulations. Hearing Testimony, p. II-197.

30. Denham corroborated that J. Schroering required the drivers to turn in DOT logbooks, but testified that J. Schroering would on occasion require the drivers to drive more hours than the DOT regulations allow. Denham testified that he "could not turn in [his] logs at the end of the trip because they were illegal logs." Hearing Testimony, p. I-63. Denham continued, "I told [J. Schroering] that you couldn't–you could not turn in a legal log at the end of the trip because of the hours. And he told me that there is plenty [of] log books in there, the mailbox; that you could take two or three if you want to, and run two log books. And when you finish your run, then you could turn your legal log in. And I just refused to do it." Hearing Testimony, p. I-63.

31. Q-1 Motor Express hired Denham in February 1991. On February 6, 1991, Q-1 Motor Express gave Denham a

written warning for striking a fixed object with truck and tearing a trailer curtain. On February 15, 1991, Q-1 Motor Express gave Denham a verbal warning for "drifting off the road" while driving on Interstate 65, which occurred apparently from driver fatigue. On April 2, 1991, J. Schroering verbally warned Denham for violating DOT logbook regulations. On May 3, 1991, J. Schroering gave Denham a written warning for additional DOT log-keeping violations. On March 28, 1991, Q-1 Motor Express suspended Denham for three days for again violating DOT log regulations. Finally, on May 28, 1991, Q-1 Motor Express fired Denham for failing to log or report to Q-1 Motor Express that he received a traffic violation ticket and for failing to notify Q-1 Motor Express of his location or activities for approximately 19 hours during an eight-hour trip.

32. As of May 28, 1991, J. Schroering testified that "[Denham's] behavior had been very belligerent for the last couple of weeks; he was running all over company rules. At that point I decided to terminate him that day." Hearing Testimony, p. III-36.

33. Denham admitted in his testimony that he routinely violated DOT regulations, that he had torn (but also had repaired) the trailer curtain, that he occasionally would fall asleep while driving, and that he failed to report to Q-1 Motor Express that he received a traffic ticket.

34. Only after Denham had been suspended and was facing the fourth and final step of Q-1 Motor Express's disciplinary policy, did he approach Shaw about starting a union drive.

35. Denham filed for unemployment benefits with the Commonwealth of Kentucky. Although Denham claimed that Q-1 Motor Express had fired him for his union-related activities, the unemployment referee concluded that Denham was fired for work-related misconduct.

36. Q-1 Motor Express hired Stevens on August 15, 1990. On October 25, 1990, Q-1 Motor Express verbally warned Stevens for backing into another truck and then fleeing the scene of the accident. On February 7, 1991, Stevens damaged a tire and rim

and continued driving for over 100 miles on the damaged wheel to conclude his trip. Q-1 Motor Express did not believe that the damage to the trailer was consistent with Steven's account that his tire suffered an ordinary blow-out, but believed that Stevens negligently drove his truck over a large object and gave Stevens a written warning for the incident. On April 25, 1991, Q-1 Motor Express suspended Stevens for three days for falsifying a Workman's Compensation claim and lying to J. Schroering three times about the true nature and cause of the accident. Finally, Q-1 Motor Express fired Stevens on May 30, 1991, because Stevens failed to make himself available for dispatch (as required) during the 1991 Memorial Day holiday.

37. Stevens admitted in his testimony that the October, 1990 and February, 1991 incidents happened (although he contended he did nothing wrong with regard to the February incident). He admitted that he lied on the Workers' Compensation claim form and to J. Schroering about the true nature of the April, 1991 accident, but denied that he was unavailable for dispatch during the Memorial Day holiday.

38. Like Denham, only after he had been suspended and was in the final state of Q-1 Motor Express' disciplinary process (facing possible termination for one more infraction) did Stevens express a desire to be represented by a union.

39. Stevens did not file a claim for unemployment benefits.

40. Lupo started working for Q-1 Motor Express as a part-time or casual driver in November, 1990.

41. Lupo, on two separate occasions, called Leah Conrad at Q-1 Motor Express to tell her he had been drinking alcohol all night long and was therefore unavailable for dispatch, once in March, 1991, and one on May 22, 1991. For example, Leah Conrad testified that on May 22, 1991, "Tony Lupo notified me at approximately 5:00 A.M. When I answered the phone his voice was slurred; at one point he was talking loud, at another point he was talking soft. He stated to me that he had been at a bar called

Shakey's . . . and that he was too drunk to get out." Hearing Testimony, p. III-161.

42. Because he was unavailable for dispatch on May 22, 1991, Q-1 Motor Express told Lupo that he would no longer be considered for a full-time position.

43. On June 7, 1991, Q-1 Motor Express dispatched Lupo to pickup a load at A.O. Smith Automotive in Milwaukee; this was to be Lupo's "last load." Hearing Testimony, p. III-63. When Lupo returned on June 8, 1991, he failed to turn in his log sheets, his trip report, his fuel ticket, and bills of lading. Lupo did not respond to Q-1 Motor Express' repeated efforts to contact him about the missing paperwork.

44. Lupo went to Leah Conrad's house to pick up his paycheck and turn in the missing paperwork on June 17, 1991. Q-1 Motor Express at that time gave Lupo a written warning for failing to turn in the paperwork on a timely basis.

45. Q-1 Motor Express tried to contact Lupo on June 18, 19, and 20, 1991, for dispatch, but Lupo did not return Q-1 Motor Express' calls or report for dispatch. Q-1 Motor Express terminated Lupo on June 21, 1991, essentially for abandoning work; J. Schroering testified, "He did a disappearing act at that point." Hearing Testimony, p. III-65.

46. Like Denham, Lupo filed for unemployment benefits, claiming that he was discharged for union-related activities. The Kentucky Unemployment Insurance Commission found that Q-1 Motor Express had fired Lupo for work-related misconduct.

47. On July 18, 1991, Local Union No. 89, claiming that a majority of Q-1 Motor Express drivers had signed union authorization cards, demanded union recognition from Q-1 Motor Express.

48. In support of their claim of majority status, Local Union No. 89 presented six union cards, five of which were signed

by Q-1 Motor Express drivers. Of the cards submitted into evidence, Denham's, Lupo's, James Hogan's, and Todd Tomes' cards bore their own signatures. Willard Martin's card bore Martin Suddeth's signature and Stevens' card bore no signature, although his card was filled out entirely in his own handwriting.

49. Suddeth signed Martin's card with Martin's authorization, and Stevens had intended (but inadvertently forgot) to sign his card.

50. Martin Suddeth, a mechanic for Q-1 Motor Express, also signed and presented his own union card to Local Union No. 89.

51. In her petition for injunctive relief, the petitioner claimed that the appropriate bargaining unit in May, 1991 constituted "All employees of Respondent employed as truck drivers at or out of Respondent's Clarksville, Indiana terminal, but excluding all guards and supervisors as defined in the Act."

52. On July 18, 1991, Q-1 Motor Express was employing a total of 14 drivers, seven part-time and seven full-time. Denham, Stevens, and Lupo were not among those 14 drivers, they had been terminated prior to Local Union No. 89's demand for recognition.

53. Mark Conrad, husband of Leah Conrad, also testified for Q-1 Motor Express.

54. Hogan, Lupo, Denham, and Stevens testified as rebuttal witnesses for the petitioner.

55. Generally, this court finds that Q-1 Motor express' witnesses were more credible than the petitioner's witnesses; the drivers' testimony appeared to the court to have been "scripted," having been uniform in many details that would otherwise naturally yield to certain inconsistencies, and less than candid. For example, when Denham was asked, "Did you have any problems [at or about the time he was falling asleep at the wheel] with your wife," Denham responded, "No." Yet, when counsel for Q-1 Motor

Express was unexpectedly allowed to examine Denham's pocket calendar,[7] the following colloquy took place:

Q Mr. Denham, I'm looking at this calendar, and it indicates that there was an appointment at a lawyer's office at 9:00 a.m. . . . What lawyer was that?

A I don't recall.

Q Is he your lawyer?

A Yes.

Q Does he represent anyone else in this proceeding?

A Child support. Former

Q During the time that we have been talking about, were you having a problem with your ex-wife?

A No, I was having a problem paying my child support.

Q Was this causing a problem for you?

A No, it was causing a problem for her.

Q And that didn't cause you any concern, didn't affect your work at all?

A No, other than I went down and made an appointment with the lawyer to try to get my child support lowered a little bit.

THE COURT: Well, it did create a problem, didn't it? You had to consult a lawyer.

THE WITNESS: I wrote it down, anyway.

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[7] Denham refreshed his recollection with the pocket calendar, and without objection, the petitioner allowed counsel for Q-1 Motor Express to examine the pocket calendar. Hearing Testimony, p. I-113.

Hearing Testimony, p. I-113; p. I-114.

56. This Court finds that it is unlikely that the petitioner will be able to show that J. Schroering or Q-1 Motor Express coercively interrogated his employees about union cards or union membership, that Q-1 Motor Express threatened to close its plant and open up with "different bingo stickers," that Q-1 Motor Express threatened to discharge or worsen working conditions, that Q-1 Motor Express offered concessions to ward-off an impending union, or that Q-1 Motor Express discharged Denham, Stevens, or Lupo for their union-related activities.

57. Any conclusion of law stated below, to the extent that it constitutes a finding of fact, is herein incorporated by reference as an additional finding of fact by the court.

III. Conclusions of Law

58. This court has subject matter jurisdiction to consider and decide the issues presented by the petitioner. 29 U.S.C. § 160(j).

59. A federal district court may grant a preliminary injunction (prior to a pending N.L.R.B. hearing) "as it deems just and proper."[8] *N.L.R.B. v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 891 (7th Cir. 1990). A court considers "traditional equitable principles" when deciding whether an injunction is "just and

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[8]Although district courts historically have made an initial and separate determination of whether there is "reasonable cause to believe the employer has engaged in an unfair labor practice," *see Szabo v. P*I*E Nationwide, Inc.*, 878 F.2d 207 (7th Cir. 1989), this circuit has merged the reasonable cause determination with the question of whether an injunction is "just and proper." *Kinney v. Pioneer Press*, 881 F.2d 485, 490-91 (7th Cir. 1989) ("The district judge must assess not only the harm that may go unchecked during the 'notoriously glacial' course of N.L.R.B. proceedings, but also the probability that the General Counsel will succeed in convincing the N.L.R.B. that someone has in fact violated the labor laws . . . . The two questions, we have noted, 'tend[] to merge.' . . . [N]othing is gained by engrafting on § 10(j) proceedings a preliminary reasonable cause test."

proper." *Id.; Kinney v. Pioneer Press,* 881 F.2d 485, 490 (7th Cir. 1989.

60. "An injunction under Section 10(j), like all injunctions, is an 'extraordinary remedy' that should be granted only in those situations in which effective enforcement of the N.L.R.A. is threatened by delays inherent in the N.L.R.B. dispute resolution process. Failure to establish irreparable injury and probability of success on the merits dooms any request for an injunction." *Kinney,* 881 F.2d at 494; *accord N.L.R.B. v. P*I*E Nationwide, Inc.,* 894 F.2d at 891.

61. In sum, the *Kinney*/traditional equities approach requires a N.L.R.B. petitioner to demonstrate (1) no adequate remedy at law; (2) irreparable harm in the absence of an injunction exceeding the irreparable harm the other side will suffer if the injunction issues; (3) a reasonable likelihood of winning on the merits; and (4) the harm to the public interest stemming from the injunction is tolerable in light of the benefits achieved by the relief. *Id.* at 491; *accord Kinney v. Dominick's Finer Foods, Inc.,* No. 91-C-4217, 1991 U.S. Dist. LEXIS 14341, at *5 (N.D. Ill. Oct. 4, 1991).

62. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights to organize and bargain through representatives of their own choosing. 29 U.S.C. § 158(a)(1).

63. Employees violate Section 8(a)(1) by interrogating employees about union activities, threatening employees with layoffs or plant closures, or creating an impression of surveillance. *N.L.R.B. v. Berger Transfer & Storage,* 678 F.2d 679, 689 (7th Cir. 1982). An employer also violates Section 8(a)(1) by "soliciting grievances when such solicitation is accompanied by an express or implied promise of benefits specifically aimed at interfering, restraining and coercing employees in their organizational effort." *Id.; N.L.R.B. v. Tom Wood Pontiac, Inc.,* 447 F.2d 383, 384-85 (7th Cir. 1971).

64. "An employer violates Section 8(a)(3) when it discharges an employee because of his union activities." *Justak Bros. & Co. v. N.L.R.B.*, 664 F.2d 1074, 1077 (7th Cir. 1981); *see* 29 U.S.C. 158(a)(3).

65. To establish a Section 8(a)(3) violation, a petitioner must demonstrate that the "employer's actions were motivated by anti-union considerations." *Justak,* 664 F.2d at 1077. If it is established that the employee's protected conduct was a motivating factor, the burden shifts to the employer to demonstrate that he would not have discharged the employee even in the absence of the protected conduct. *Id.* The employer's reason for termination need not be accepted if there is a reasonable basis to believe that it was merely pretextual. *Id.; N.L.R.B. v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

66. Based largely on the failed credibility of the petitioner's witnesses and the strength of Q-1 Motor Express' witnesses and evidence, the petitioner has failed to show a likelihood or probability of success of demonstrating that Q-1 Motor Express committed Section 8(a)(1) violations by threatening retaliation or creating an impression of surveillance or making improper inducements to discourage union activity.

67. The May 19, 1991, meeting was conducted in the ordinary course of other employer meetings. The pay raise, the offer to consider payment for detention time, insurance for a driver, and the advancement of Lupo to full-time were discussed without references to or implied promises about the union and were unrelated to the union campaign, and this court finds that it is unlikely that the petitioner will be able to show that these acts constituted violations of Section 8(a)(1).

68. The petitioner has also failed to show a probability or likelihood of success of demonstrating Section 8(a)(3) violations. Rather, the evidence produced by Q-1 Motor Express causes this court to conclude that Q-1 Motor Express fired Denham, Stevens, and Lupo solely for their work-related misconduct.

69. Additionally, considering other traditional equitable principles, this court is of the opinion that an injunction is not "just and proper" in this instance. This court finds that no injunction is necessary to preserve the status quo and that only private interests are at stake in ordering a prohibitive injunction and/or the reinstatement of Denham, Lupo, or Stevens. Further, this court finds no risk of irreparable harm to the union, the remaining Q-1 Motor Express drivers, or the N.L.R.A. flowing from the non-issuance of an injunction.[9]

70. In the "exceptional" case of "outrageous" and "pervasive" unfair labor practices, the N.L.R.B. can order an employer to bargain with the union regardless of the lack of a demonstrated card majority. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969).[10]

71. In the "less extraordinary cases marked by less pervasive practices," if an employer refuses to recognize a demand for recognition (supported by a valid card majority) and then engages in independent unfair labor practices which would tend to preclude the holding a fair election, the N.L.R.B. can order the employer to bargain with the union. *Id.*

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[9] This court notes (as one factor) that although the petitioner received affidavits from Denham, Lupo, and Stevens on June 20, 1991, she did not file unfair labor practice charges until July 18, 1991, and waited until October 2, 1991, to file for a Section 10(j) injunction. Delay alone is not enough to show latches, "harm there must be," *see P*I*E Nationwide, Inc.*, 894 F.2d at 894, but this court takes the petitioner's delay as some indication of her opinion that an injunction is necessary to prevent imminent and irreparable harm and preserve the status quo.

[10] Usually, employees sign union cards to demonstrate a "showing of interest" in support of a petition for a representation election. However, a union sometimes presents signed union cards to an employer directly to demonstrate that a majority of employees has chosen it as a bargaining representative. *Montgomery Ward & Co. v. N.L.R.B.*, 668 F.2d 291 (7th Cir. 1981). Sometimes, when an employer learns that union cards are being distributed, the employer takes steps--often in violation of law--to discourage or prevent a union from achieving a majority status. ROBERT A. GORMAN, LABOR LAW 93 (1976).

72. A bargaining order is "reserved for unusual cases." *Montgomery Ward & Co. v. N.L.R.B.*, 904 F.2d 1156 (7th Cir. 1990) (Easterbrook, J., concurring).

73. Because this court finds that it is unlikely that the petitioner will show that Q-1 Motor Express engaged in either "outrageous" and "pervasive" or "less extraordinary" and "less pervasive" unfair labor practices, a bargaining order would not be "just and proper."[11]

74. At the evidentiary hearing, this court reserved ruling on whether Martin's and Stevens' union cards could be admitted to show a majority status. In light of the above conclusion of law, the motion to admit those cards is moot, and this court denies it as such.

75. This court also reserved ruling on Q-1 Motor Express' motion for judgment present at the end of the petitioner's evidence. This court now denies that motion.

76. The findings of a district court "proceeding under Section 10(j) for interlocutory relief is viewed in its relation to the primary N.L.R.B. proceeding under Section 10(b), it is neither final nor conclusive to the issue there presented." *Evans v. International Typographical Union,* 76 F.Supp. 881 (S.D. Ind. 1948); *accord N.L.R.B. v. Acker Industries, Inc.*, 460 F.2d 649, 652 (10th Cir. 1972); *Squillacote v. Meat Allied Food Workers,* 390 F.Supp. 1180, 1182, n.2 (E.D. Wis. 1975); citing *Acker Industries, Inc.*). The findings of this court, therefore, are not binding upon the pending, if not ongoing, N.L.R.B. proceeding.

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[11] Had this court concluded that the petitioner could have shown that Q-1 Motor Express committed "less extraordinary" and "less pervasive" unfair labor practices, this court would still not have issued a bargaining order. At the time Local Union No. 89 demanded recognition, assuming all six union cards were admissible to show a majority status--including Denham's, Lupo's and Stevens' cards, even though their employment had been terminated prior to July 18, 1991--the petitioner still failed to show that a majority of the 14 drivers employed on July 18, 1991, had designated Local Union No. 89 as their bargaining representative. *Justak,* 664 F.2d at 1080 (majority status is determined as of the date of the demand).

77. Any finding of fact stated above, to the extent that it constitutes a conclusion of law, is hereby incorporated by reference as an additional conclusion of law by the court.

IV. Conclusion

Based on the above findings and conclusions, this court denies the petitioner's request for injunction relief under Section 10(j).

It is so ORDERED this 23rd day of December, 1991.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

APPENDIX F

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 29, 1994

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. DONALD P. LAY, Circuit Judge*
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge

NATIONAL LABOR RELATIONS BOARD, Petitioner,	]	Application for Enforcement of an Order of the National Labor Relations Board
No. 93-1746 v.	]	
Q-1 MOTOR EXPRESS, INCORPORATED, Respondent.	]	9-CA-28654-1, 9-CA-28654-2, 9-CA-28654-3, 9-CA-28762

ORDER

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* Honorable Donald P. Lay, of the Eighth Circuit, is sitting by designation.

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by respondent, a vote of the active members of the court was requested, and a majority of the active members of the court have voted to deny rehearing *en banc*. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.